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NO. _____

IN THE

Supreme Court of the United States

October Term, 1962

STRACHAN SHIPPING COMPANY, *Petitioner*,

v.

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V., ET AL., *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the majority of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 30, 1962, and its order by a majority of the judges denying a petition for rehearing entered on June 20, 1962.[1]

[1] Both the original opinion and the opinion on Petitioner's Petition for Rehearing were concurred in by two judges of the Court of Appeals below with Circuit Judge Cameron dissenting as to both opinions. Although Petitioner sought a rehearing **en banc** in the Court of Appeals below, no ruling was made specifically on this, and apparently only the three judges who heard oral argument ever considered Petitioner's Petition for Rehearing.

Citations to Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Fifth Circuit are printed as Appendix "A" hereto, infra, page 43, and are reported at 301 F. 2d 741.

The opinion of the Court of Appeals denying petitioner's petition for rehearing is printed as Appendix "B" hereto, infra, page 55, and is reported at 304 F. 2d 545. The opinion of the United States District Court for the Southern District of Texas is printed as Appendix "C" hereto, infra, page 61, and is reported in 197 Fed. Supp. 201.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 30, 1962 (Appendix "A", page 54, infra) and the order denying petition for rehearing was entered with an opinion on June 20, 1962 (Appendix "B", page 60, infra). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Is a State's jurisdiction over injuries sustained on land by maritime employees employed under a maritime stevedoring contract limited to fixing the rights of employees against their employers and third parties, or does it include the right to fix the rights and liabilities of the employer and third parties as well?

2. If a State's jurisdiction over land based injuries sustained by maritime employees includes the right to control all the rights and liabilities of all parties connected with such an injury, does the Workmen's Compensation Act of Texas limit an employer's liability to the benefits of that Act so that a third party vessel owner may

not assert a claim for indemnity based on an implied in law warranty of workmanlike service in its stevedoring contract?[2]

Statement

The original plaintiff below, B. A. Rawlinson, a longshoreman, was injured on July 23, 1956, while in the employ of a stevedoring company, Strachan Shipping Company, the Petitioner herein and the Appellee in the Court of Appeals below, for clarity hereinafter referred to as the Stevedoring Company. At the time of the injury the longshoreman was working on the dock at Long Reach Docks assisting in the loading of pipe aboard the SS MENTOR, a vessel owned by the Respondent herein and the Appellant below, Koninklyke Nederlandsche Stoomboot Maalschappy, N. V., for clarity hereinafter referred to as the Vessel Owner. The accident occurred on the dock when the longshoreman was caught between a piece of pipe and the side of the vessel.

Since the longshoreman's injury occurred on the dock and not on navigable waters, his workmen's compensation claim against his Stevedoring Company employer and its insurance carrier clearly came within and therefore was processed under the Workmen's Compensation Act of Texas.[3] On November 1, 1957, the Industrial Accident Board of the State of Texas approved a compromise settlement entered into between Texas Employers' Insurance

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[2] There was no written contract of indemnity in this case. It therefore involves only what the law implies from a stevedore's agreement to do the stevedoring work alongside of and aboard a vessel.

[3] Article 8306 et seq., Vernon's Annotated Civil Statutes of Texas.

Association, the compensation carrier for the Stevedoring Company, and the longshoreman. In connection with the longshoreman's claim under the state statute, the compensation carrier on behalf of the Stevedoring Company expended $5,875 in compensation payments to the longshoreman and $2,558 in payment of his medical expenses. It is uncontroverted that the Stevedoring Company employer fully complied with the provisions of the Workmen's Compensation Act of Texas.

On May 26, 1958, the Vessel Owner was served with citation and a copy of the petition in the suit brought by the longshoreman against it in the 157th District Court of Harris County, Texas. The Vessel Owner thereafter removed the cause to the Federal Court. On September 22, 1959, the Vessel Owner filed its third party complaint seeking indemnity against the longshoreman's employer, the Stevedoring Company. The third party complaint attempted to allege a cause of action for indemnity on two theories: (1) ordinary negligence,[4] and (2) the alleged breach of contractual duties implied from the Stevedoring Company employer working near said vessel. There was no written contract of indemnity between the Vessel Owner and the Stevedoring Company, the only thing in writing between the Vessel Owner and the Stevedoring Company being a schedule of money rates for various stevedoring operations, and a statement of working conditions, none of which have any bearing on the questions presented on the present petition.

[4] This negligence theory has long since been abandoned by the Vessel Owner, as it was never urged on the District Court below and the Vessel Owner went to great length in its brief in the Court of Appeals below to emphasize that it was not relying on any tort theory of recovery.

Thereafter in November, 1959, the longshoreman and the Vessel Owner compromised and settled the longshoreman's basic suit against the Vessel Owner for $20,000, leaving for later determination the alleged indemnity action filed by the Vessel Owner against the longshoreman's employer, the Stevedoring Company.

In opposition to the Vessel Owner's action seeking indemnity, the Stevedoring Company filed a Motion for Summary Judgment on the grounds that as employer of the longshoreman its compliance with the provisions of the Texas Workmen's Compensation Act fully satisfied the Stevedoring Company's legal obligations to all parties connected with the longshoreman's injury of July 23, 1956. (R. 25).

The District Court below granted the Stevedoring Company's Motion for Summary Judgment because under the controlling Texas cases the Vessel Owner is not entitled to recover indemnity from the Stevedoring Company. In so doing, the District Court below correctly held:

> 1. That since the Longshoreman-Employee's injury occurred on the dock, that the rights and the liabilities of the injured employee[5] and the rights and the liabilities of his Stevedoring Company-Employer were controlled by the Workmen's Compensation Act of Texas, (R. 31; Appendix "C", infra, page 61).
>
> and
>
> 2. That it was the settled law of Texas that "compliance by employer with the Texas Compensation Act terminates all liability of the employer

[5] This included the employee's right to assert a third party action against the Vessel Owner after he had concluded his compensation claim against his employer.

arising out of covered injuries to employees." (R. 32; Appendix "C", page 61).

In reversing the District Court below, the majority opinion of the Court of Appeals below held that a State Workmen's Compensation Act cannot limit the liability of the stevedoring company employer solely to that provided by the Compensation Act in such a way as to prevent the Vessel Owner from asserting a cause of action for indemnity against the Stevedoring Company, a cause of action implied in law from the maritime contract under which the longshoreman was working at the time of his injury.[6] In so doing, the Court of Appeals reached a result in direct and irreconcilable conflict with its decision only fourteen months earlier in a case arising in Louisiana where it had held that the Louisiana Workmen's Compensation Act prevented the injured longshoreman from asserting a cause of action for unseaworthiness for his injuries against the vessel owner, a cause of action implied in law from the maritime contract under which the longshoreman was working at the time of his injury.[7]

The two judge majority in the Court of Appeals below also held that the District Court below had incorrectly followed the decisions from the Texas Courts interpreting the Workmen's Compensation Act of Texas, declined to consider the relevant language of the Texas cases, and held that this was a case of first impression under the Work-

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[6] R. 52, Appendix "A", infra, page 52.

[7] This earlier case is Kent v. Shell Oil Company, 286 F.2d 746 (C.A. 5, Jan. 31, 1961). For a full discussion of the irreconcilable conflict between the decision of the majority of the Court of Appeals below in the present case and in the **Kent** case, see Reason for Granting the Writ No. III, infra, pages 25 to 30.

men's Compensation Act of Texas and speculated that the Texas courts would ignore the language of their earlier cases and reach an entirely opposite result. In so doing, the majority opinion of the Court of Appeals below held that the Texas Workmen's Compensation Act did not prevent the Vessel Owner from asserting a cause of action for indemnity against the Stevedoring Company employer.

Dissenting Judge Cameron of the Court of Appeals below disagreed with the two judge majority on both holdings, and stated not only that the State law, not the maritime law, controlled but recognized the conflict between the opinion of the majority of the Court of Appeals below and that Court's earlier decision in the *Kent* case.[8] Judge Cameron was the only judge in the Court of Appeals below who participated both in the present case and the *Kent* case. Judge Cameron also clearly recognized that the majority opinion of the Court of Appeals below did not properly interpret the Workmen's Compensation Act of Texas as it had been applied by the Texas courts.

Reasons for Granting the Writ

I

The holding of the majority opinion of the Court of Appeals below that "a State Compensation Act cannot prevent an action against the employer by the third party based on a Federal judicially-established maritime contractual warranty" is directly in conflict with the decisions of this Court in:

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[8] **Kent v. Shell Oil Company**, 286 F. 2d 746 (1961).

Wilburn Boat Company, et al. v. Firemen's Fund Insurance Company, 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368, 1955 A.M.C. 467 (1955)

and

Romero v. International Terminal Operating Company, 358 U.S. 354, 3 L. Ed. 2d 368, S. Ct. 468, 1959 A.M.C. 832 (1959). (*Infra*, page 10)

II.

The holding of the majority opinion of the Court of Appeals below that the stevedoring contract between the Vessel Owner and the Stevedoring Company as to land-based injuries to an employee of the stevedoring company is governed exclusively by the general maritime law is directly contrary to the holdings of this Court in the following cases:

Swanson v. Marra Bros., 328 U.S. 1, 90 L. Ed. 1045, 66 S. Ct. 869, 1946 A.M.C. 715;

T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 72 L. Ed. 520, 48 S. Ct. 288, 1928 A.M.C. 446 (1928);

State Industrial Commission of New York v. Nordenholt Corporation, 259 U.S. 263, 66 L. Ed. 933, 42 S. Ct. 473 (1922). (*Infra*, page 21)

III.

The holding of the majority opinion of the Court of Appeals below that a State Workmen's Compensation Act cannot prevent an action by a vessel owner against a stevedoring company arising out of a maritime stevedoring contract is in direct and irreconcilable conflict with the earlier holding of the Court of Appeals below on January 31, 1961, in *Kent v. Shell Oil Company*, 286 F. 2d 746, that a State Workmen's Compensation Act pre-

vented an action against a vessel owner arising out of a maritime stevedoring contract. (*Infra*, page 25)

IV.

An authoritative decision from this Court on this important question is needed at this time to clear up the confusion and uncertainty created by the decision of the majority of the Court of Appeals below, which confusion manifested itself in a decision of the U. S. District Court for the Eastern District of Louisiana only nine short days after the majority's opinion denying a petition for rehearing was filed in the present case. (*Infra*, page 30)

V.

The holding of the majority opinion of the Court of Appeals below is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Johnston v. Marshall*, 128 F. 2d 13 (1942) which held that when an injury to a maritime employee is sustained on the dock that the State law and not the general maritime law is controlling. (*Infra*, page 34)

VI.

The majority opinion of the Court of Appeals below completely ignored this Court's decision in *Nolan v. Transocean Airline*, 365 U.S. 293, 5 L. Ed. 2d 571, 81 S. Ct. 555 (1961), and in so doing declined to follow the relevant Texas cases and therefore incorrectly interpreted the provisions of the Workmen's Compensation Act of Texas. (*Infra*, page 35)

Discussion of Reasons for Granting the Writ

I.

The holding of the Court of Appeals below that "a State Compensation Act cannot prevent an action against the employer by the third party based on a Federal judicially-established maritime contractual warranty"[9] is directly in conflict with the decisions of this Court in:

Wilburn Boat Company, et al. v. Firemen's Fund Insurance Company, 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368, 1955 A.M.C. 467 (1955),

and

Romero v. International Terminal Operating Company, 358 U.S. 354, 3 L. Ed. 2d 368, 79 S. Ct. 468, 1959 A.M.C. 832 (1959).

The majority opinion of the Court of Appeals below held that even though the longshoreman was injured on the dock completely within the jurisdiction of the State of Texas that since the contract between the Stevedoring Company and the Vessel Owner was a maritime contract the Texas Workmen's Compensation Act could not in any way affect any implied in law warranties relating to such a shore based injury arising out of the maritime contract. While all concede that the Workmen's Compensation Act of Texas completely controls the rights and liabilities between the longshoreman-employee and the Stevedoring Company-Employer arising out of their Maritime Stevedoring Contract, the majority opinion of the Court of Appeals below held that this same State Compensation Act was of absolutely no significance and should be com-

[9] R. 52. Appendix "A", infra, page 52.

pletely ignored insofar as determining the rights and liabilities between the Vessel Owner and the Stevedoring Company-Employer were concerned.

The sole basis for the decision of the majority opinion of the Court of Appeals below that the Texas Compensation Act could not preclude the Vessel Owner's indemnity action against the Stevedoring Company-Employer was that the Vessel Owner's cause of action arose out of a maritime contract to stevedore the vessel, and that a State could in no way regulate the rights and liabilities of the parties to such a maritime stevedoring contract.

If, as the majority opinion of the Court of Appeals below held, the Texas Compensation Act cannot affect the rights and liabilities of the Vessel Owner and the Stevedoring Company simply because it is a maritime contract, how then can the Texas Workmen's Compensation Act control the rights and liabilities between the injured longshoreman-employee and the Stevedoring Company-Employer arising out of their maritime stevedoring contract under which the injured longshoreman was doing the physical labor required by the maritime stevedoring contract between the Vessel Owner and the Stevedoring Company? Certainly the contract of employment between the injured longshoreman and the Stevedoring Company is no less a maritime stevedoring contract than is the contract between the Vessel Owner and the Stevedoring Company. Both contracts were for the stevedoring of the vessel. If one is a maritime contract, so is the other. If one maritime stevedoring contract is controlled by State law, so is the other. How can it be said that one maritime stevedoring contract (between Vessel Owner and Stevedoring Company) is governed solely by the general maritime law but the other maritime stevedoring contract (between long-

shoreman and Stevedoring Company) is governed solely by the laws of the State of Texas? But this is precisely what the Court of Appeals below held. What an incongruous decision this is![11]

Precisely this same contention—that a maritime contract is governed solely by the general maritime law and cannot be affected by State law—was urged upon this Court with respect to a maritime contract of insurance only a few years ago. In flatly rejecting this reasoning and in holding that a maritime contract is *not* governed solely by the general maritime law but on the contrary in many situations by State law, this Court succinctly said:

> "But it does not follow, as the courts below seemed to think (and as the majority of the Court of Appeals below here held), that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts, as in that of maritime torts, the National Government has left much regulatory power in the States." [12] (Parenthetical expression added).

In 1959, only four years later, this Court reiterated this precise quotation[13] and speaking through Mr. Justice Frankfurter also said:

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[11] Both of these maritime stevedoring contracts contemplated work by the longshoreman employee and the Stevedoring Company employer wherever they might be needed whether in the dockside warehouse, on the dock apron or on the vessel's decks or in the vessel's holds.

[12] **Wilburn Boat Company, et al. v. Fireman's Fund Insurance Co.**, 348 U.S. 310, at page 313, 99 L. Ed. 337, at page 342, 75 S. Ct. 368, 1955 A.M.C. 467, at page 471 (1955).

[13] **Romero v. International Terminal Operating Co.**, 358 U.S. 354, at page 374, 3 L. Ed. 2d 368, at page 383, 79 S. Ct. 468, 1959 A.M.C. 832, at page 847 (1959).

"Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article 3 evolved by the courts, *to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification* of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce.[14] (Emphasis supplied).

* * *

"Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law through our history."[15]

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[14] Id., 358 U.S. 354, at page 373, 3 L. Ed. 2d 368, at page 382, 79 S. Ct., 468, 1959 A.M.C. 832, at page 846 (1959).

[15] Id., 358 U.S. 354, at page 371, 3 L.Ed. 2d 368, at page 383, 79 S. Ct. 468, 1959 A.M.C. 832, at page 847 (1959).

In pointing up the joint role played by the State and Federal Governments in the field of both maritime contracts and maritime torts, Mr. Justice Frankfurter referred to only a few of the areas in which State laws have been held controlling in maritime contract and tort matters:

1. State-created liens
2. State remedies for wrongful death
3. State survival statutes
4. State rules for the partition and sale of ships
5. State laws governing the specific enforcement of arbitration agreements.
6. State laws regulating maritime insurance contracts.

To focus this joint role of the State and Federal Governments on our specific problem, the situations arising out of maritime activities are numerous where the State law controls if an accident occurs on the dock, but where the general maritime law controls if the accident occurs upon a vessel on navigable waters. A few brief examples will quickly demonstrate this:

1. If the injury occurs on the dock, the Texas compensation act applies, while if aboard a vessel the Longshoremen's Act applies. The difference in the amounts recoverable by an injured employee or his widow under the two acts is striking —under the Texas Act for total permanent disability maximum compensation payable is $14,035.00 and for death is

That the rights and liabilities of all parties arising out of an injury sustained ashore within the jurisdiction of a

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$12,600.00, while the Longshoremen's Act provides $54.00 per week for the life of the injured man or his widow which for a man with a life expectancy of only 20 years means compensation of $56,160.00 and for a widow for the same 20 years means compensation of $39,484.00 if she does not remarry.

2. If the injury occurs on the dock, the Texas Two Year Statute of Limitations on the commencement of a personal injury or death action against a vessel applies while if the injury occurs on a vessel, there is no applicable statute of limitations but the maritime doctrine of laches applies. However, to assist them on the laches issue the Admiralty Courts look to state statutes of limitation by analogy so as to shift the burden of proof of no laches to the libellant. This burden shifts after two years in Texas, but after only one year in Louisiana and varies state to state.

3. If the injury occurs on the dock the Texas Two Year Statute of Limitations within which an action can be commenced against a third party is tolled during the pendency of the injured longshoreman's claim under the Workmen's Compensation Act of Texas so the longshoreman has two years after the termination of his Texas compensation claim in which to file his third party action. If the injury occurs on the vessel, the Longshoremen's Act applies and limitations is not tolled by the pendency of the compensation claim under the Longshoremen's Act. See **Bruner v. Skibsaktieselskabet Hilda Knudsen,** 123 F. Supp. 903 (S.D.) Tex. 1954).

4. If the injury occurs on the dock, the injured longshoreman must either prosecute his claim under the Workmen's Compensation Act of Texas to a conclusion and then file his third party action or his filing of a third party action forfeits his rights to compensation under the Texas Act. If the injury occurs on the vessel, however, the injured longshoreman can assert his third party action against the vessel and his claim for compensation under the Longshoremen's Act simultaneously.

5. In some jurisdictions in cases involving injuries resulting in death, contributory negligence of the deceased is a complete bar to any recovery from the vessel whether the death occurs on the dock or aboard the ship. Yet if in the same accident another person aboard the vessel is only injured, the maritime doctrine of comparative negligence applies to

State is one of those areas in which both the maritime law and the Congress of the United States have left the

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the injured person and his contributory negligence does not bar his recovery completely, but only goes to mitigate his damages. For a graphic case involving such a fact situation, see the opinion of Judge J. Skelly Wright of the Eastern District of Louisiana in **Byrd v. Napoleon Avenue Ferry Company**, 125 F. Supp. 573 (1954) which was affirmed by the Court of Appeals below **per curiam** on the basis of Judge Wright's opinion, 227 F. 2d 958 (1955), certiorari denied 351 U.S. 925, 100 L.Ed. 1455 (1956).

6. In still another situation involving injuries resulting in death, if the deceased longshoreman is injured aboard a vessel and his own negligence contributed to his injury and later death, the beneficiaries of the deceased longshoreman cannot recover damages for his death but in some jurisdictions his beneficiaries can recover for the deceased's pain and suffering prior to his death on the grounds that the doctrine of comparative negligence applies to the deceased's own cause of action for pain and suffering which accrued prior to his death and is expressly made to survive his death by a state survival statute. This result is obtained on the basis of the difference between the Wrongful Death Statute and the Survival Statute of the state where the injury occurs. See, as a single example, **Curtis v. Garcia y Cia**, 241 F. 2d 30 (3 C.A. 1957).

7. In its recent decision in **Kermerac v. Compagnie Generale Transatlantique**, 358 U.S. 625; 3 L.Ed. 2d 550; 79 S.Ct. 406 (1959), this Court held that a "gratuitous licensee" (visitor of a crewmember) injured aboard a vessel in the Port of New York was entitled to recover on the grounds that the maritime law imposed a duty of ordinary care on the vessel owner for his safety. It is clear from the opinion that had the injury occurred on the adjoining dock or in the warehouse the law of the State of New York would have precluded any recovery since under the law of New York a duty of ordinary care was not owed to a "gratuitous licensee."

The foregoing is by no means an exhaustive list of the many situations arising out of maritime activities within the territorial waters of the several states where the rights, liabilities and remedies of the parties differ greatly depending on whether the injury occurs on the dock so that the State law governs, or on the vessel where the maritime law is supreme.

powers of regulation solely in the hands of the States is made abundantly clear by those decisions of this Court leading up to the passage of the Longshoremen's & Harbor Workers' Compensation Act, and by the Congress itself in the language employed by it in the Longeshoremen's Act.

Both the express language and the judicial history[16] behind the passage of the Longshoremen's & Harbor Workers'

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[16] The judicial history behind this precise language in the Longshoremen's Act starts with the decision in **Southern Pacific Company v. Jensen,** 244 U.S. 206, 61 L.Ed. 1086 (1916), in which the United States Supreme Court categorically held that the compensation act of the State of New York could not constitutionally be applied to a longshoreman who was injured on board a vessel on navigable waters of the United States within the territorial waters of the State of New York.

In an attempt to give to the states the right to control the liabilities of employers and employees under their workmen's compensation acts where injuries occurred upon navigable waters within a state such as was involved in the **Jensen** case, in 1917 Congress passed a statute purporting to save to injured employees the rights and remedies under the workmen's compensation law of the state in which they were injured. (Chap. 97, 40 Statute at Large 395). However, in **Knickerbocker Ice Co. v. Stewart,** 253 U.S. 149, 64 L.Ed. 834 (1920), the United States Supreme Court declared this Act of Congress to be unconstitutional as an unauthorized delegation to the states of powers reserved to the Federal Government with respect to the navigable waters of the United States.

In still another attempt to give to the states the control of the rights and liabilities of employers and employees where injuries were received upon navigable waters within the jurisdiction of the several states, in 1922 Congress again passed an act purporting to reserve to injured employees their rights to compensation under an applicable state workmen's compensation act (Act of June 10, 1922, Chap. 216, 42 Statutes at Large 634). Once again in **Washington v. Dawson & Company,** 264 U.S. 219, 68 L.Ed. 646 (1924), the United States Supreme Court held that Act of Congress to be unconstitutional as an unauthorized delegation to the states of the Federal Government's exclusive control over injuries occurring upon navigable waters of the United States.

Following this second unsuccessful attempt to make the workmen's compensation acts of the several states applicable to injuries

Compensation Act vividly reflect the intention of the Congress to expressly reserve to the States the determination of the rights and liabilities of all parties where personal injuries are sustained by employees on land within the jurisdiction of a State. The Longshoremen's Act provides that it applies—

> "... only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."[17]

This language in the Longshoremen's Act was no accident or inadvertent choice of words, but in fact was carefully and deliberately chosen to effectuate the stated purpose of Congress—to leave in the hands of the States complete control over the rights and liabilities of their own employers and employees where the injury occurs so that a state workmen's compensation law can be validly applied.

As the language quoted above from Section 903(a) of the Longshoremen's Act so clearly shows, in passing this Act to specifically cover the rights and liabilities of employers and employees arising out of injuries sustained upon navigable waters of the United States, Congress was very careful to provide that the Longshoremen's Act would control these rights and liabilities only if the injury occurred upon navigable waters.

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received upon navigable waters within the jurisdiction of the several states, in 1927 Congress enacted the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 901ff, to fill this gap in workmen's compensation coverage of maritime employees.

17 33 U.S.C.A., Section 903(a).

Thus not only the history but the very language of the Longshoremen's Act clearly demonstrates the Congressional intent that the rights and the liabilities of the employers and employees alike, where an injury occurs within the jurisdiction of a state workmen's compensation act, were not to be in any way affected by the passage of the Longshoremen's Act and that such rights and liabilities were to be governed by the workmen's compensation acts of the several states.

The basic error in the majority opinion of the Court of Appeals below in its holding that a State Compensation Act cannot regulate to any extent the rights and liabilities of the parties to a maritime stevedoring contract is brought into sharp focus when the majority opinion states that it does not see "the relevance of the position of the injured party or his personal alternative remedies under State or Federal Compensation Acts."[18] This stems from the majority's erroneous interpretation of the decision by this Court in the *Ryan* case.[19] The majority opinion obviously concluded that *Ryan* established a hard and fast rule that covered the entire field of indemnity in maritime matters regardless of the place where the injury occurred, and thus fell into the very error which this Court warned against in *Wilburn Boat*, *supra*, and *Romero*, *supra*—that is, the error of concluding that every term in every maritime contract can only be controlled by some Federally defined admiralty rule.

As pointed out in the dissenting opinion of the Court of Appeals below and by the District Court below, *Ryan* held nothing more than that a stevedoring company owed

[18] R. 46, Appendix "A", infra, page 46.

[19] **Ryan Stevedoring Co., Inc. v. Panatlantic Steamship Corporation,** 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232, 1956 A.M.C. 9 (1956).

a vessel owner a warranty of workmanlike service for breach of which it could recoup its damages, but only if the applicable Workmen's Compensation statute did not preclude such an indemnity action against the stevedoring company-employer. In *Ryan* this Court had to consider whether or not the Longshoremen's & Harbor Workers' Compensation Act prohibited an indemnity recovery against the stevedoring company-employer, not because it was a Federal statute that could override a judicially created admiralty rule, but because this Court clearly recognized that any legislative body in enacting a Workmen's Compensation Act had not only the power but the duty to fix the rights and liabilities of the employee, the employer and the third party vessel owner.

If, as the majority opinion below holds, the applicable compensation act which regulates the Stevedoring Company employer's liability arising out of an injury to one of his employees is to be completely ignored and is of no materiality, one cannot help but wonder why this Court in deciding the *Ryan* case devoted more than half of its opinion (both majority and dissenting opinions) to a consideration of what it described as the first question it had to decide:

> "1. The first question is whether the Longshoremen's Compensation Act precludes the assertion by a shipowner of a stevedoring contractor's liability to it, where the contractor is also the employer of the injured longshoreman."

Obviously, this was the first question that had to be considered since this Court clearly recognized that whichever workmen's compensation act was applicable to the injury involved, the legislature which passed it had the

power to preclude any claim of any kind not only against the injured man's employer but with respect to third parties as well. Until such time as this Court had decided that the Longshoremen's Act did not preclude an indemnity action against the Stevedoring Company employer, it could not even reach the question of whether or not an indemnity action existed.

Thus the very case which gave birth to the theory of indemnity relied on by the Vessel Owner in this case clearly and categorically shows that the first question which the Court of Appeals below should have considered is which compensation act is applicable to this longshoreman's injury and whether or not that compensation act precludes the assertion of an indemnity action against the Stevedoring Company employer.[20]

This principle the majority opinion in the Court of Appeals below did not recognize, but instead held that regardless of what the Workmen's Compensation Act of Texas provided, that the law of Texas could not in any way affect the maritime stevedoring contract between the Vessel Owner and the Stevedoring Company, even though it at the same time clearly recognized that the law of Texas controlled not only in part, but completely, the maritime stevedoring contract between the injured longshoremen and the Stevedoring Company. Both of these contracts directly related to the injury received by the longshoreman in this case are clearly maritime contracts for the stevedoring of the vessel tied up alongside the dock where the injury was received. Yet if the present opinion of the majority of

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[20] This obviously is necessary to give full effect to the policy and purpose of the controlling workmen's compensation act as established by the state legislature and as interpreted by the courts of that state, just as was done in the **Ryan** case where the Longshoremen's & Harbor Workers' Compensation Act was involved.

the Court of Appeals below stands, as to these land-based injuries, one of these maritime stevedoring contracts is governed exclusively by State law whereas the other is governed exclusively by the general maritime law.

The complex and difficult problems involved from the jointly exerted regulatory powers of the State and Federal governments, and the development of the law relating to maritime contracts and torts, with which this Court is so familiar does not need the great confusion and inconsistency which the decision of the majority in the Court of Appeals below introduces into the maritime law.

Until now the line of demarcation between Federal and State jurisdiction had been clearly marked. If the injury was sustained upon navigable waters, whether the action sounded in contract or in tort, the Federal maritime law controlled, but if the injury was received ashore within the jurisdiction of a State, the rights and liabilities, whether in contract or in tort, were governed exclusively by State law. This is an important principle in the maritime law which until the decision of the majority in the Court of Appeals below was handed down was completely free of this conflict and confusion.

It is respectfully submitted that the clearly erroneous decision of the maojrity in the Court of Appeals below should be reviewed to eliminate the confusion created by its decision in this important area of the maritime law.[21]

II.

The holding of the majority opinion of the Court of Appeals below that the stevedoring contract between the Vessel Owner and the Stevedoring Company as to land-

[21] For a discussion of the confusion that has already been created see Reason for Granting the Writ No. IV, infra, page 30.

based injuries to an employee of the stevedoring company is governed exclusively by the general maritime law is directly contrary to the holdings of this Court in the following cases:

> Swanson v. Marra Bros., 328 U.S. 1, 90 L.Ed. 1045, 66 S.Ct. 869, 1946 A.M.C. 715;
> T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 72 L.Ed. 520, 48 S.Ct. 288, 1928 A.M.C. 446 (1928);
> State Industrial Commission of New York v. Nordenholt Corporation, 259 U.S. 263, 66 L.Ed. 933, 42 S.Ct. 473 (1922).

In these three cases this Court made it perfectly clear that if any injury is sustained on land, the State law, not the maritime law, is applicable, and the State law determines the rights and liabilities of the parties arising out of any maritime contracts under which the injured longshoreman was performing the stevedoring services. In two of these cases, in both of which the injury was sustained on the dock alongside the vessel being loaded, just as was true of the longshoreman injured in the present case, this Court stated the controlling rule thusly:

> "Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated #2 of Article 3. *But, if the cause of action arose upon the land, the State law is applicable.*"[22] (Emphasis supplied).

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[22] **T. Smith & Son, Inc. v. Taylor,** 276 U.S. 179, at page 181, 72 L.Ed. 520, at page 522, 48 S.Ct. 228, 1928 A.M.C. 446, at page 448, (1928).

> When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribed the liability, and the local law has always been applied. *The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.*"[23]

The factor which makes the decision of the majority of the Court of Appeals below in this case so shocking and so clearly in comflict with these decisions of this Court is the holding of the Court of Appeals below only fourteen months earlier in a Louisiana case pending before it involving a shorebased injury to a maritime employee as follows:

> "That brings into play two principles, one of Federal constitutional and statutory recognition of exclusive State power, the other concerning the peculiar manner, in which Louisiana—within that power—has fashioned its policy respecting the rights of victims of industrial injuries. *As to the first, shore-based injuries sustained by those working even in direct relation to maritime matters without exception have long been recognized by the Supreme Court as a matter for application of State Compensation Acts.*"[24] (Emphasis supplied).

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[23] **State Industrial Commission of New York v. Nordenholt Corporation**, 259 U.S. 263, at page 272, 66 L.Ed. 933, at page 936, 42 S.Ct. 473 (1922).

[24] **Kent v. Shell Oil Company**, 286 F. 2d 746, at page 750 (1961). Appendix "D", infra, page 76.

In support of this holding that the rights and remedies of the parties arising out of this shore-based injury was governed exclusively by the laws of Louisiana, the Court of Appeals below in the *Kent* case cites as its authority the two decisions of this Court referred to above: *T. Smith & Son, Inc. v. Taylor*,[25] and *State Industrial Commission of New York v. Nordenholt Corporation*.[26]

Only fourteen months before the decision of the majority of the Court of Appeals below in the present case, a different panel of judges in the Court of Appeals below had reached exactly the opposite result from that of the present case because that panel of judges followed the decisions of this Court referred to above in *T. Smith & Son, Inc. v. Taylor*, and *State Industrial Commission of New York v. Nordenholt Corporation*.

The only distinction which the majority opinion of the Court of Appeals below in the present case attempts to make with that Court's earlier decision in the *Kent* case is on the ground that *Kent* was dealing with the rights and remedies of an employee while the present case deals with the rights and remedies of a third party vessel owner who had been sued by the injured employee. Such a distinction is wholly without any substance or basis whatsoever, for if the State law is to control the rights and liabilities of the parties arising out of a shore-based injury, including the injured employee's cause of action under the general maritime law for unseaworthiness as *Kent* held, then for even stronger reasons the State law must also control the rights and liabilities of the other two parties

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[25] **T. Smith & Son, Inc. v. Taylor**, 276 U.S. 179, 72 L.Ed 520, 48 S.Ct. 228, 1928 A.M.C. 446, (1928).

[26] **State Industrial Commission of New York v. Nordenholt Corporation**, 259 U.S. 263, 66 L.Ed. 933, 42 S.Ct. 473 (1922).

connected with that shore-based injury, the vessel owner and the stevedoring company.[27]

The present decision of the majority of the Court of Appeals below makes the State law control the rights of the employee, but sets aside for special treatment the vessel owner and makes the general maritime law controlling as to it, even though the injury was sustained solely within the jurisdiction of a State. This is clearly in conflict not only with the two decisions of this Court but with the decision of the Court of Appeals below in the *Kent* case.

III.

The holding of the majority opinion of the Court of Appeals below that a State Workmen's Compensation Act cannot prevent an action by a vessel owner against a stevedoring company arising out of a maritime stevedoring contract is in direct and irreconcilable conflict with the holding of the Court of Appeals below on January 31, 1961, in *Kent v. Shell Oil Company*, 286 F. 2d 746, that a State Workmen's Compensation Act prevented an action against a vessel owner arising out of a maritime contract.[28]

The *Kent* case involved an injury to a man who normally worked as a truck driver but who had as a part of his duties in connection with the job on which he was injured the loading of pipe from a truck into a barge moored in navigable waters at a landing on the Mississippi River. His

[27] For a more complete discussion of the conflict in the opinion of the majority of the Court of Appeals below in this case and of that Court's earlier decisions by a different panel of judges in **Kent v. Shell Oil Company**, 286 F. 2d 746 (1961), see Reason for Granting the Writ No. III, infra, page 25.

[28] For the convenience of this Court the opinion of the Court of Appeals below in the **Kent** case is printed in full and attached as Appendix "D" to this brief, infra, page 71.

duties differed from that of the longshoreman here only in that Kent had transported the cargo to be loaded aboard the barge to the dock on a truck whereas the longshoreman here and his fellow workers simply had to load the pipe from railway cars on the dock or from the dockside warehouse into the vessel. Kent was injured while loading the pipe from the truck directly into the barge. Since the contract between Kent's employer and the third party vessel owner called for the loading of a vessel, it was no less a maritime contract than the one involved here. In holding that the Louisiana Workmen's Compensation statute controlled not only Kent's rights against his employer but any rights he might have to assert a third party action against the barge or its owners as well, the Court of Appeals below speaking through Circuit Judge Brown stated that since Kent's injury was received on the dock or landing and not on the vessel this brought:

> " . . . into play two principles, *one of Federal Constitutional and statutory recognition of exclusive State power*, the other concerning the peculiar manner in which Louisiana—within that power—has fashioned its policy respecting the rights of victims of industrial injuries. *As to the first, shore-based injuries sustained by those working even in direct relation to maritime matters without exception have long been recognized by the Supreme Court as a matter for application of State compensation acts.*" [29] (Emphasis supplied).

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[29] **Kent v. Shell Oil Company,** 286 F. 2d 746, at page 750. Appendix "D", infra, page 76. This is the same quotation as that appearing **supra,** page 23 and as previously pointed out was based on this Court's express holdings in **T. Smith & Son, Inc., v. Taylor,** 276 U.S. 179, 72 L.Ed. 520, 48 S.Ct. 288, 1928 A.M.C. 446 (1928), and **State Industrial Commission of New York v. Nordenholt Corporation,** 259 U.S. 263, 66 L.Ed. 933, 42 S.Ct. 473 (1922).

Since the Louisiana Workmen's Compensation Act reflected that State's policy that Kent could not maintain a third party action against the vessel owner and notwithstanding Kent's work in direct relation to maritime matters, the Court of Appeals below correctly held that he could not maintain his third party action against the vessel. That the Louisiana Workmen's Compensation Act precluded the assertion of any rights which Kent might have had under the general maritime law was made perfectly clear when the Court said:

> "*Since Louisiana forbids recovery of damages against such a third party, it matters not whether the asserted third party claim rests on negligence* of a kind known to the common law or that of a kind known to the civil law *or on notions of unseaworthiness indigenous to the general maritime law.*"[30] (Emphasis supplied).

As was true in *Kent*, we are concerned in the present case with the rights and liabilities of three parties when an employee of one is injured ashore while working in direct relation to maritime matters.

The conflict between the majority opinion of the Court of Appeals below in this case with that Court's earlier decision in the *Kent* case is graphically, although undoubtedly inadvertently, summarized in the next to the last sentence of the majority opinion:

> "We held in *Kent*, *supra*, that a state compensation act can bar an injured employee from suing a third party. If, however, such a suit is permitted, and is pursued to final settlement, a state compensation act cannot prevent an action against the employer by the

[30] Id. 286 F. 2d 746, at page 752; Appendix "D", infra, page 80.

third party based on a federal judicially-established maritime contractual warranty." [31]

The majority below were laboring under the mistaken impression that that Court's earlier holding in *Kent* did not prevent an action by the injured employee "based on a federal judicially-established maritime contractual warranty", but only prevented the employee's action on common law or civil law concepts of negligence. Obviously the majority did not feel that its holding in this case was in conflict with *Kent* because it was laboring under the erroneous impression that in *Kent* that Court had not held that a state compensation act prevented an action "based on a federal judicially-established maritime contractual warranty."

The cause of action based on the unseaworthiness of the vessel which *Kent* was not permitted to assert because of the Louisiana Compensation Act was in fact based as much on a "federal judicially-established maritime contractual warranty" as is the cause of action created by *Ryan* [32] which the third party vessel owner attempts to assert in this case and which the majority opinion below holds cannot be affected to any extent by a state compensation act.

The Court of Appeals below held in *Kent* that the third party vessel owner's laibility for its "federal judicially-established maritime contractual warranty" of the seaworthiness of its vessel to the injured employee was completely terminated by the Louisiana Compensation Act while in the present case the majority holds that the Texas Compensation Act cannot in any way affect the liability of a steve-

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[31] Id. 286 F. 2d 746 (C.A. 5, 1961); Appendix "D", infra, page 71.

[32] **Ryan Stevedoring Co., Inc. v. Panatlantic Steamship Corp.**, 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232, 1956 A.M.C. 9, (1956).

doring company under its "federal judicially-established maritime contractual warranty" of workmanlike service owed to the Vessel Owner.

The holdings of the Court of Appeals below in *Kent* and of the majority in the present case in this respect are clearly in direct and irreconcilable conflict for these is no reasonable basis on which it can be said that the Louisiana Compensation Act can forbid a recovery otherwise granted by a "federal judicially-established maritime contractual warranty", owed to an injured employee by the third party vessel owner, but that the Texas Compensation Act cannot have the same effect on a "federal judicially-established maritime contractual warranty" owed to the third party vessel owner by the stevedoring company employer.

The two decisions of the Court of Appeals below cannot be reconciled. As to shore-based injuries, either a state workmen's compensation act can do away with a "federal judicially-established maritime contractual warranty" as was held in *Kent* or it cannot as was held in this case. To permit the inconsistent holdings of the majority in the present case and of the *Kent* case to stand can only lead to hopeless confusion in these areas involving shore-based injuries to workers engaged in maritime employment.

It is particularly significant to note that dissenting Judge Cameron in the present case was the only judge of the Court of Appeals below who also took part in the decision of that Court in the *Kent* case. In his dissenting opinion, Judge Cameron clearly recognizes the conflict between the majority opinion in the present case and the decision of the Court of Appeals below in the *Kent* case. Judge Cameron correctly stated that the Court below should again follow the decisions of this Court in *T. Smith & Son, Inc. v. Taylor, supra*, and *State Industrial Commission of*

New York v. Nordenholt Corporation, supra,[33] as it had done in the *Kent* case in which he had participated some fourteen months earlier.

The only recourse which Petitioner has in an attempt to get the Court of Appeals below to clear up this conflict in its own decisions rests with this Court. This for the reason that Petitioner sought to have the Court of Appeals below consider the conflict between the decisions of the majority in the present case and of the Court of Appeals below in the *Kent* case by filing a Petition for Rehearing En Banc. In fact, the Petition for Rehearing was not considered *en banc*, but was overruled by the same two judges who wrote the original majority opinion with Judge Cameron again registering his dissent.

It is respectfully submitted that in view of these two decisions of the Court of Appeals below, one (*Kent*) of which follows the decisions of this Court in *T. Smith & Son, Inc. v. Taylor, supra,* and *State Industrial Commission of New York v. Nordenholt Corporation, supra,* and the other (the present case) which completely ignores and does not even cite them, that this Court should grant this writ to clear up this conflict in the decisions of the Court of Appeals below. This is particularly true where the only Circuit Judge common to the panel of judges that considered both cases below clearly recognizes and points out the conflict in his dissenting opinion.

IV.

An authoritative decision from this Court on this important question is needed at this time to clear up the

[33] For a full discussion of the conflict between the present case and these two decisions of this Court, see Reason for Granting the Writ No. II, **supra,** page 21.

confusion and uncertainty created by the decision of the majority of the Court of Appeals below which manifested itself only nine short days after the majority's opinion denying a petition for rehearing was filed in the present case.

The confusion and erroneous results which undoubtedly will flow if the decision of the majority of the Court of Appeals below in this case remains uncorrected is graphically demonstrated in a decision by United States District Judge Christenberry of the Eastern District of Louisiana in *Leonard v. Lykes Bros. Steamship Company, Inc.*, which was rendered on June 29, 1962.[34] In the *Leonard* case Judge Christenberry, a United States District Judge of many years and of great experience in admiralty and maritime matters overruled a motion to dismiss a libel which had been filed by a longshoreman against his employer seeking a recovery because of the alleged unseaworthiness of a vessel for personal injuries sustained by the injured longshoreman while working on the dock. This longshoreman was employed directly by the vessel owner, Lykes Bros. Steamship Co., Inc., who had provided compensation under the Louisiana Workmen's Compensation Act. Judge Christenberry held, relying solely on the decision of the majority of the Court of Appeals below in the present case, that the Louisiana Workmen's Compensation Act could not preclude the injured employee from asserting a cause of action under

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[34] No. 5136 Admiralty - **Alphonse Leonard v. Lykes Bros. Steamship Company, Inc.** - United States District Court Eastern District of Louisiana, New Orleans Division. The opinion is not yet reported but for the Court's convenience is reprinted in full as Appendix "E" to this petition, infra, page 82. Counsel for Petitioner is advised that a Motion for Rehearing has been filed and submitted but no ruling on it has been made by Judge Christenberry up to this time (September 10, 1962).

the maritime law against his employer and that the injured employee was not limited to his remedies under the Louisiana Workmen's Compensation Act.

Judge Christenberry did so on the theory announced by the majority in the present case that a state law cannot in any way effect the rights and liabilities arising out of a maritime contract for the stevedoring of a vessel. This is but a logical conclusion by Judge Christenberry from the opinion of the majority of the Court of Appeals below, yet it is without question absolutely unsupportable by any previous authority and is in fact in direct and irreconcilable conflict with the decisions of this Court too numerous to cite which expressly hold that as to an injury sustained ashore, state workmen's compensation acts completely control the rights as between the employee and his employer.

The confusion created as evidenced by Judge Christenberry's decision is all the more startling when the decision of the Court of Appeals below in the *Kent* case[35] is considered once again. In *Kent*, the Court of Appeals below held that the Louisiana Workmen's Compensation Act prevented a maritime contractual cause of action from being asserted against a vessel owner who was not the employer of the injured longshoreman. Yet Judge Christenberry, on the basis of the majority opinion of the Court of Appeals below in the present case, holds that the Louisiana Workmen's Compensation Act cannot prevent any maritime cause of action an employee may have against his own employer. The effect of Judge Christenberry's holding is that an employer in Louisiana has less protection and less insulation from liability under the Louisiana Workmen's Compensation Act than does some third party who is not

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[35] **Kent v. Shell Oil Company**, 286 F. 2d 746 (1961) Appendix "D", infra, page 71.

the injured man's employer. Yet the whole purpose of workmen's compensation acts is to fully protect the employer from just such causes of actions outside the limited scope of a workmen's compensation act, while usually leaving in full effect all rights the injured employee might have against any third parties.

The case presently pending before District Judge Christenberry in New Orleans is not simply an isolated incident where this issue has arisen again, but is only one in what must undoubtedly be a large number of cases in which this precise issue is being considered by United States District Judges. In fact there are at least two cases presently pending in the United States District Court for the Southern District of Texas in which the District Judges on whose dockets these cases have been filed are awaiting final determination of this important issue in the present case before proceeding with their pending cases. One of these is pending in the Houston Division of the United States District Court for the Southern District of Texas[36] and the other is pending in the Corpus Christi Division of the United States District Court for the Southern District of Texas.[37]

Undoubtedly the important questions presented by this petition involving as they do the question of whether or not the state law or the maritime law is controlling where maritime employees are injured ashore are present in innumerable cases throughout the country in this prolific area of litigation involving suits by longshoremen against third party vessel owners who in turn file indemnity actions

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[36] C.A. No. 13,133 — **Albert Taylor v. Maxine Navigation Co., Inc. v. Southern Stevedoring & Contracting Co.**

[37] C.A. No. 1970 — **John Workmen v. Motourid Shipping Corporation v. Gulf Stevedore Corporation.**

against the stevedoring company employers. An early decision by this Court clearly spelling out the law which is to control in these cases involving land based injuries to maritime employees is urgently needed for the expeditious administration of justice. As is true in all important issues in the orderly development of the law maritime, it is one as to which, as this Court has so often stated, this Court has "large responsibilities, constitutionally conferred,"[38] and this petition should therefore be granted.

V.

The holding of the majority opinion of the Court of Appeals below is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Johnston v. Marshall*, 128 F. 2d 13 (1942) in which case the Court of Appeals for the Ninth Circuit expressly followed this Court's decision in *State Industrial Commission of New York v. Nordenholt Corporation supra*[39] and held that when an injury to a maritime employee was sustained on the dock that the State law and not the general maritime law was controlling.

This conflict in the decisions of the Courts of Appeals for the Fifth and Ninth Circuits should be resolved in this important area of litigation involving the rights and liabilities of the parties arising out of shore-based injuries sustained in the performance of duties arising under maritime stevedoring contracts.

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[38] **Southwestern Sugar & Molasses Company v. River Terminal Corp.**, 360 U.S. 411, at page 415, 3 L.Ed. 1334, at page 1339, 79 S.Ct. 1210 (1959).

[39] For a full discussion of this decision of this Court, see Reason for Granting the Writ No. II, **supra**, page 21.

VI.

The majority opinion of the Court of Appeals below completely ignored this Court's decision in

Nolan v. Transocean Airline, 365 U.S. 293, 5 L.Ed. 2d 571, 81 S.Ct. 555 (1961).

In the *Nolan* case this Court remanded to the Court of Appeals for the Ninth Circuit a case involving a question of the proper interpretation of a state statute in California. In remanding this case to the Court of Appeals for the Ninth Circuit, this Court stated that in determining questions relating to state laws, the Courts of Appeals were to give full effect to any "considered, relevant dictum of general scope" from the state courts[40] where the precise question at issue had not yet been decided in that State.

In holding that even if the Vessel Owner's rights were controlled by the law of Texas, that the Texas Workmen's Compensation Act did not preclude an action for indemnity by the Vessel Owner against the Stevedoring Company, the majority of the Court of Appeals below completely ignored the "considered, relevant dictum of general scope" and other statements from the Texas Courts on substantially identical or related questions which clearly show that a proper interpretation of the Workmen's Compensation Act of Texas compels a holding that the stevedoring company employer in this case cannot be held liable for indemnity to the Vessel Owner.

As the five to four decision of this Court in the *Ryan* case[41] shows, there are two interpretations which have been

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[40] **Nolan v. Transocean Airline,** 365 U.S. 293, at page 295, 5, L.Ed. 2d 571, at page 573, 81 S.Ct. 555 (1961).

[41] **Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.,** 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232, 1956 A.M.C. 9 (1956).

made by various Courts on the effect of an exclusive liability provision in a Workmen's Compensation Act. These interpretations and the reasons therefor are reflected by the majority and minority opinions in the *Ryan* case as follows:

1. The five justice majority[42] in *Ryan* held that the exclusive liability provisions of the Longshoremen's Act only related to tort theories of recovery and did not bar a shipowner's right to indemnity which was implied as a part of a contract to stevedore a vessel for the first time in the *Ryan* case.

2. The four dissenting justices[43] in *Ryan* adopted the other interpretation that an exclusive liability provision in a Workmen's Compensation Act barred any claim whether sounding in tort or contract because an employer could not be compelled to pay damages to an injured employee indirectly through an implied indemnity procedure, when that employer clearly could not be required to pay such damages to the injured employee directly.

These are the two interpretations made by the courts of an exclusive liability provision in a Workmen's Compensation Act and the decisions interpreting the exclusive liaiblity provisions of the various Workmen's Compensation Acts of the several states are divided on which interpretation is correct, just as this Court was almost equally divided on which interpretation should be made of the Longshoremen's Act in the *Ryan* case. As both dissenting Judge Cameron of the Court of Appeals below and the District Court below so concisely stated:

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[42] Opinion by Mr. Justice Burton, concurred in by Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Minton and Mr. Justice Harlen.

[43] Opinion by Mr. Justice Black, concurred in by Mr. Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Clark.

> "True, the Court's thinking (the five justice majority in this Court in the *Ryan* case) as to *why* the Federal Act does not bar recovery could be applied as well to the Texas Act with the same result, but Texas courts have not chosen to follow this thinking. Apparently convinced legislative policy so compels, Texas courts hold compliance by employer with the Texas Compensation Act terminates all liability of employer arising out of covered injuries to employees."[44] (Parenthetical expression added).

The language from the Texas cases which so clearly indicates the correctness of the conclusion reached by dissenting Judge Cameron of the Court of Appeals below and the District Court below on the Texas law is as follows:

> "As correctly stated by the Court of Civil Appeals, the Mosher Steel & Machinery Company (Third Party Defendant employer) was not charged by the pleading or shown by the evidence to have been guilty of any active negligence, and, having protected itself by providing compensation insurance for its employees, *could not be compelled to pay indirectly when no liability existed to pay directly.*"[45] (Emphasis and parenthetical expressions supplied).
>
> "Further, appellee's employer fully protected himself against his own negligence (not amounting to gross negligence) by providing compensation insurance for his employees, and *could not be compelled to pay indirectly when no liability existed to pay directly.*"[46] (Emphasis supplied).

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[44] R. 31, 32, 53; Appendix C, infra, page 66; Appendix A, infra, page 53.

[45] **West Texas Utilities v. Renner**, 53 S.W. 2d 451, at page 456 (Commission of Appeals 1932).

[46] **West Texas Utilities v. Renner**, 32 S.W. 2d 264, at page 270 (Civ. App. 1930).

> "The gin company (Third Party Defendant) showed conclusively that it carried workmen's compensation on its employees, that Henslee (the plaintiff) was its employee and that its insurance carrier had paid him workmen's compensation. *Since the gin company was a subscriber under the Workmen's Compensation Law, appellants (Third Party Plaintiffs) certainly could not obtain judgment over against it for contribution or indemnity* without allegation and proof of some act constituting gross negligence. *West Texas Utilities Co. v. Renner*, Tex. Civ. App., 32 S.W. 2d 264, affirmed Tex. Com. App., 53 S.W. 2d 451."[47] (Emphasis and parenthetical expressions added).

As was true of Judge Ingraham in the District Court below in the present case, Judge Connally also of the District Court below in still an earlier case had interpreted the Texas Workmen's Compensation Act as barring indemnity from a covered employer:

> "The Government (Third Party Plaintiff) has cited no authority allowing recovery under these circumstances. In the opinion by the Commission of Appeals in *West Texas Utilities Co. v. Renner*, there is found a statement dealing with a similar fact situation, that the employer *'could not be compelled to pay indirectly.'*"[48] (Parenthetical expression added).

As is apparent from the above quotation from the District Court below, adopted by dissenting Judge Cameron of the Court of Appeals below; and from the quotations from the foregoing Texas cases, the Texas courts have held

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[47] **Westfall v. Lorenzo Gin Company**, 287 S.W. 2d 551, at page 554 (Civ. App. 1956, no writ history).

[48] **McCormick v. U.S.**, 134 F. Supp. 243, at page 246 (S.D. Tex., 1955).

that the legislative policy of Texas in its Workmen's Compensation Act was to protect an employer from having to pay damages indirectly to an employee when it could not be compelled to pay them directly. Thus, of the two possible interpretations of the effect of an exclusive liability provision in a Workmen's Compensation Act so ably set out in the majority and dissenting opinions in *Ryan*, the three Texas courts which have considered the question and the two different District Judges in the District Court below which have considered it have uniformly held that Texas follows the view so ably expressed in the dissenting opinion in *Ryan* that an employer cannot be compelled to pay indirectly that which it canot be compelled to pay directly.

Thus, it is clear that the three Texas courts, including the Supreme Court of Texas, and two different District Judges in the District Court below have recognized the legislative policy of Texas that an employer covered by the Workmen's Compensation Act of Texas cannot be subjected to indirect liability to its own employee where the injury is received within the jurisdiction of the Texas Workmen's Compensation Act. And it is undisputed that the injury in this case falls solely within the purview of the Texas Workmen's Compensation Act. These decisions of the three Texas courts and of the two different District Judges in the District Court below clearly reflect that the Texas courts have indicated that an indemnity action cannot be maintained against an employer, whether on a contract or tort theory, where the Workmen's Compensation Act of Texas is involved. In view of the jurisprudence in Texas on this question, dissenting Judge Cameron of the Court of Appeals below and the District

Court below reasonably and correctly concluded that the Texas courts have rejected the reasoning of the five-judge majority in *Ryan* and have accepted the reasoning of the four-judge minority in *Ryan* in construing the Workmen's Compensation Act of Texas.

The reasoning of the Texas courts and of the four-judge minority in *Ryan* simply gives full effect to the policy and purpose behind the workmen's compensation act.[19]

The majority opinion of the Court of Appeals below in the present case completely ignores these plain expressions from the Texas courts that the indirect liabilities of an employer permitted by the Longshoremen's Act are not permitted by the Texas Workmen's Compensation Act. When full credence is given to these statements from

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[19] As this Court knows, the purpose of the workmen's compensation act is to provide an employee injured in the scope of his employment with a right to compensation for his injuries unimpeded by any defenses or the necessity of proving fault against his employer. In return, however, the employee accepting the provisions of the compensation act must accept the limited compensation paid in lieu of a possibly larger verdict. For giving up his defenses and accepting absolute liability, the employer's liability is limited in such manner as the legislative body directs. The policy and purpose of such a law would be circumvented if the employee can obtain a larger verdict, or, as here, a larger settlement, from a third party, and if the third party is then permitted to obtain indemnity from the employer. The end result is that the employee ultimately obtains on account of his injuries an amount from his employer larger than that recoverable under the applicable workmen's compensation law.

The holdings in the foregoing cases that an employer cannot be compelled to pay indirectly when no liability exists to pay directly are but a brief and concise statement of the policy and purpose of a workmen's compensation act. The policy of the compensation act is paramount, and this policy, based as it is on the liability of the employer without regard to fault, is completely inconsistent with a claim against the employer for indemnity.

the Texas courts, no other reasonable conclusion can be reached than that the Texas courts have rejected the reasoning of the majority in *Ryan* and adopted that of the four-judge minority. If the reasoning of the Texas courts is accepted, as it must be by this Court, the Vessel Owner cannot assert an indemnity action here against the Stevedoring Company employer. The refusal of the majority opinion to recognize this in the absence of a "white horse" case directly in point is directly contrary to this Court's admonition that "considered, relevant dictum of general scope" from the state courts must be given full effect in determining the law of a state in the absence of the "express holding" which the majority opinion in the present case requires.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I certify that copies of the foregoing Petition for Writ of Certiorari have been served upon the attorneys for the Respondent, Mr. William M. Kimball of Messrs. Burlingham, Underwood, Barron, Wright & White, successors to Messrs. Burlingham, Hupper & Kennedy, 26 Broadway, New York 4, New York, and Mr. Clarence S. Eastham of Messrs. Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston 2, Texas, by depositing the same in the United States Post Office with First Class postage prepaid, air mail to New York, to the addresses shown above on this the_____day of September, 1962.

_____

Of Royston, Rayzor & Cook

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19181

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V.,
ROYAL NETHERLANDS STEAMSHIP COMPANY,
Appellant,

versus

STRACHAN SHIPPING CO.,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

(March 30, 1962)

Before RIVES, CAMERON and GEWIN, Circuit Judges.

RIVES, Circuit Judge: The court below dismissed Royal's third-party complaint against Strachan, and Royal appeals. Rawlinson, a longshoreman employed by Strachan, sued Royal for injuries sustained while on a Houston dock helping to load a ship owned by Royal. The accident occurred when Rawlinson was caught between a piece of pipe being

loaded and the side of the ship. Since the injuries occurred while Rawlinson was on the dock and not on navigable waters, he pursued to settlement an action under the Workmen's Compensation Act of Texas. Rawlinson then sued Royal in the state court claiming that his injuries were caused by negligence and by unseaworthiness of the vessel. By removal the case came to the federal court. Royal then filed a third-party complaint against Strachan asking for an indemnity for any recovery obtained by Rawlinson on the ground that Strachan had breached its implied contractual warranty to perform services in a workmanlike fashion. Royal settled the suit with Rawlinson. Strachan then moved for summary judgment on the thirty-party claim on the ground that Strachan's payments to Rawlinson in compliance with the Texas Workmen's Compensation Act barred Royal's third-party action. The district court agreed with Strachan and entered judgment dismissing the third-party complaint.

The issues presented are purely ones of law and may be stated: (1) Can a state compensation statute cut off an action by a shipowner against a stevedoring company for breach of a maritime contractual warranty to perform services in a workmanlike fashion, and/or (2) have the Texas courts so construed the exclusive remedy clause of the Texas act?

There can be little question that the stevedoring contract is a maritime contract and that breach of an implied warranty to perform services in a workmanlike fashion is governed by federal maritime law. In general, the fact that a contract is maritime is not dispositive of the law to be applied. In the absence of a federal statute, a judicially-fashioned federal rule, or a need for uniformity throughout admiralty jurisdiction, relevant state law may be applied.

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 1955, 348 U.S. 310. As the Court there framed the issue in a case of first impression with respect to maritime insurance contracts,

> ". . . in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can overrule Acts of Congress. *See, e.g., Garrett v. Moore-McCormack Co.*, 317 U.S. 239. Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?" 348 U.S. at 314.

While the Court there held that maritime insurance contracts should be governed by state law, there can be no doubt that a clearly established federal judicially-fashioned maritime rule governs a stevedore's breach of warranty to perform services in a workmanlike fashion. In a series of recent cases, the Supreme Court has held that where a shipowner is damaged by a personal injury recovery against it, which damage was occasioned by the negligence of the stevedore in the performance of his contractual undertakings, then a contract action for breach of warranty will lie against the stevedore. *See Ryan Stevedoring Co. v. Pan Atlantic Corp.*, 1956, 350 U.S. 124; *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 1958, 355 U.S. 563; *Crumady v. The J. H. Fisser*, 1959, 358 U.S. 423. The action is not a derivative one from the basis of the suit by the injured party against the shipowner, but is based purely on damage resulting from a breach of contract. Once it is held that a personal injury judgment is damage recoverable in

such a contract action, this judgment has the exact same status as, for example, damage resulting from injury to the ship itself. The question then is whether it arose as the result of the stevedore's breach of warranty and whether any conduct on the part of the shipowner would bar recovery. We do not see the relevance of the position of the injured party or his personal alternative remedies under state or federal compensation acts. The court below attached weight to the fact that the Supreme Court in *Ryan* first made the determination of whether the federal Longshoremen's Act permitted recovery for a breach of warranty. From this it argued that a similar determination must be made with respect to an applicable state compensation act. This by no means follows. Federal statutes, if constitutional, are paramount to any judicially fashioned rules of admiralty; state laws are not. *See Wilburn Boat, supra.* Thus while a Congressional direction denying the contract recovery would be decisive, a state rule would not.

Strachan relies upon our recent decision in *Kent v. Shell Oil Co.*, 5 Cir., 1961, 286 F. 2d.746, as holding that a state workmen's compensation act can control all the rights and remedies of the parties involved in this action. There a truck driver was injured while unloading pipe from his truck onto a barge moored on the shore of the Mississippi. The driver received compensation under the Louisiana compensation act and then tried to sue the barge owner on a tort and unseaworthiness theory of recovery. One of the grounds given by the court for denying recovery was that the state compensation act barred the injured party from suing a third party if the work being performed was part of the usual trade or business of such third party. The court relied upon *Swanson v. Marra Bros.*, 1946, 328 U.S. 1, for the proposition that Congress had left the determination of all

rights, duties and remedies for nonmaritime land-based injuries to local law. Assuming, that, on the authority of Swanson, local law also controls land-based injuries sustained while working in direct relation to maritime matters, it by no means follows that either *Swanson or Kent* is authority for the proposition that local law can control the rights of Royal on its maritime contract with Strachan. The question in both *Swanson* and *Kent* was the existence of a right of action in an injured employee. In both cases it was held that since Congress had expressly reserved to the states the right to provide compensation within the limits of state jurisdiction (i.e., to all injuries which did not take place on navigable waters), Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §903, the injured party's rights and remedies may be controlled by local law. *Kent* therefore held that Louisiana could bar the injured employee's right of action against a third party. Section 903 cannot be extended, however, to allow Texas to control the independent rights of Royal on its contract with Strachan once it has permitted the employee to sue. Nothing in the section can be read to give the state control over the rights and remedies of the shipowner. We are therefore of the opinion that *Kent* has no bearing on Royal's contractual rights.

Since we find no federal constitutional, statutory or other rule contrary to the federal rule fashioned in *Ryan, supra,* we conclude that Royal's contractual rights against Strachan are not affected by the state rules governing the injured party's compensation rights and remedies. The holding in *Ryan* was not based on such marginal grounds that state law to the contrary would upset its rationale and require a decision in favor of Strachan. We note that under the rationale of *Wilburn Boat, supra,* a federal rule is only es-

tablished when the Court is of the opinion that there is a substantial need for a uniform admiralty rule—a result not consistent with the appellee's position here. We also note that *Ryan* was decided in the context of the unusual admiralty rule that an injured longshoreman can recover against the shipowner without a showing of the shipowner's negligence — i.e., for unseaworthiness — a possibility not contemplated by the Texas exclusive remedy clause. In the context of the normal industrial accident covered by state workman's compensation, the only ground for a common-law action against a third party is upon a showing of that party's negligence. Under such circumstances, we are of the opinión that *Ryan* remains applicable and that the lower court was in error when it dismissed Royal's third-party complaint.

Several other Circuits have held that, as a general proposition, stevedoring and repair service contracts with a shipowner are maritime contracts and that breach of a warranty to perform services in a workmanlike fashion is governed by federal, not state, law. *See, e.g., Booth Steamship Co. v. Meier & Oelhaf Co.*, 2 Cir., 1958, 262 F. 2d 310, 312-13; *A/S J. Ludwig Mowinckels R. v. Commercial Steve. Co.*, 2 Cir., 1958, 256 F. 2d 227, 230. In both cases, however, the injuries were incurred on the ship and the court was therefore not faced with the distinction the appellee makes here. In *American Export Lines, Inc. v. Revel*, 4 Cir., 1959, 266 F. 2d 82, affirming, 162 F. Supp. 279 (E.. Va., 1958), the court was faced with the issue of a stevedoring contract indemnity for an accident which took place on the Norfolk docks. While the third-party defendant raised the issue of the indemnity being barred by the Virginia Workmen's Compensation Act the district court dismissed their contention with a peremptory citation

to *Ryan*, 162 F. Supp. at 284, and the Court of Appeals considered *Ryan* and the subsequent Supreme Court cases cited, *supra*, as controlling without even discussing the possible effect of state law. As the Court there said: "We find in this record no basis for a legally significant distinction from Crumady [v. The J. H. Fisser, 358 U.S. 423 (1959)] . . ." 266 F. 2d at 87. While the appellee argues that no Virginia court had considered the issue of a contract indemnity being barred by the Virginia Workmen's Compensation Act such that the present conflict between state and federal law was not squarely presented, the possibility of such a conflict was argued by the parties and summarily dismissed by the Court for the identical reasons we have adopted here.

But even assuming Texas could affect Royal's contractual rights, our decision would be the same since Texas has not construed its compensation act to bar Royal's *contract* indemnity. The language of the exclusive remedy clause in the Texas Workmen's Compensation Act, Vernon's Ann. Civ. Stat., Art. 8306,[1] does not on its face bar Royal's contract action. Very similar language in the federal Longshoremen's Act[2] was construed not to bar such an action in *Ryan*. We are therefore faced with the question of what construction the Texas courts have, or are likely to, put on

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[1]Art. 8306, Sec. 3, Vernon's Ann. Civ. Stat.:

"The employees of a subscriber and the parents of minor employees shall have no right to action against their employer . . . for damages for personal injuries . . . but such employees and their representatives and beneficaries shall look for compensation solely to the association [workmen's compensation insurance carrier], as the same is hereinafter provided for."

[2]The Longshoremen's and Harbor Workers' Compensation Act, Section 5 (33 U.S.C.A. § 905), says: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ."

this article. Strachan and the court below rely on two Texas cases to support their position. A reading of these cases, however, indicates that the issue was neither raised nor considered. The earliest case is *West Texas Utilities Co. v. Renner*, 32 S.W. 2d 264 (Tex. Civ. App. 1930), aff'd 53 S.W. 2d 451 (Comm. App. 1932), which involved the employee of an independent contractor who was injured by high voltage wires on the premises of the defendant. As the court there said, the independent contractor "was impleaded by the defendant below as a joint wrongdoer and joint tortfeasor, and judgment over sought against it . . ." 53 S.W. 2d at 453. It then held that the lower court was correct in saying that the independent contractor

> ". . . was not charged by the pleading or shown by the evidence to have been guilty of any active negligence, and, having protected itself by providing compensation insurance for its employees, could not be compelled to pay indirectly when no liability exists to pay directly." 53 S.W. 2d at 456.

The issue of a contractual warranty was not raised and the court did not reach or pass on the possible distinction. Nor is there any indication that such a warranty exists under Texas law. The second case is even less in point. In *Westfall v. Lorenzo Gin Co.*, 287 S.W. 2d 551 (Tex. Civ. App. 1956), the driver of one truck in a collision collected from the owner of the other; the defendant-owner then tried to bring in the plaintiff's employer on the ground that it had been guilty of gross negligence and therefore was subject to a common-law indemnity. First, there was no contractual relation between the parties to the impleader. Second, there was never any proof of gross negligence. And, finally, the court said:

> "Since the gin company was a subscriber under the Workmen's Compensation Law, appellants certainly could not obtain judgment over against it for contribution or indemnity without allegation and proof of some act constituting gross negligence." 287 S.W. 2d to 554.

Far from indicating that no indemnity of any type will ever be allowed, this language indicates that Texas is as yet unwilling to rule out an indemnity where there is a showing of gross negligence on the part of the injured man's employer, and it might even be read to imply that such an indemnity is not barred by article 8306. The appellee also cites *McCormick v. United States*, S. D., *Tex.*, 1955, 134 F. Supp. 243, in support of its position. It should first be noted that that court's interpretation of state law is no more binding on this Court than that of the court below. On the merits, the court in *McCormick* found that the third-party action was not covered by the express contractual indemnity agreement between the parties, and that the common-law tort indemnity allegation was invalid on the authority of *Rennet*. Again the issue of an implied contractual warranty was not raised, the action was not a maritime action, and the express indemnity agreement may have waived any possible implied one. The slender thread, then, upon which Strachan relies to cut off the well-settled maritime rights of Royal is a free-wheeling extrapolation of the language in *Renner* that the employer "could not be compelled to pay indirectly when no li bility existed to pay directly."

We cannot go along. The very basis of the contract distinction in *Ryan* is that it is an independent right of action not based upon or related to the injured party's theory of recovery. When the shipowner has attempted to follow the indirect tort route, the federal courts have been as quick to

strike it down as the Texas court was in *Renner*. *See American Mut. Liability Ins. Co. v. Matthews*, 2 Cir., 1950, 182 F. 2d 322; *Brown v. American-Hawaiian SS Co.*, 3 Cir., 1954, 211 F. 2d 16. Further, we note that the later Texas court in *Westfall*, *supra*, did not consider the Renner language dispositive when faced with a different theory of indemnity, one based on gross negligence. We feel that it would be even less dispositive when the suit is based on contract.' In the absence of an express holding barring Royal's contract claim, we see no reason for disturbing the rule laid down in *Ryan*.

We held in *Kent*, *supra*, that a state compensation act can bar an injured employee from suing a third party. If, however, such a suit is permitted, and is pursued to final settlement, a state compensation act cannot prevent an action against the employer by the third party based on a federal judicially-established maritime contractual warranty. Moreover, the Texas Compensation Act does not in terms, or as construed by the Texas courts, attempt so to do. The judgment of the district court is therefore

REVERSED.

CAMERON, Circuit Judge, Dissenting:

The court below says in its decision which the majority opinion reverses:

> "In Ryan and progeny the accidents or injuries were aboard ship and the federal compensation act applied. Here the injury was sustained on a dock. . . . I do not believe the Supreme Court held in Ryan and related cases that Congress, in passing the federal compensation act to fill a gap in compensation coverage, intended at the same time to limit valid state compensation

coverage in any manner. As I understand Ryan, there is an implied contract to stevedore properly, the breach of which is actionable if, and only if, the applicable compensation act does not prevent it. True, the Court's thinking as to *why* the federal act does not bar recovery could be applied as well to the Texas act with the same result, but Texas courts have not chosen to follow this thinking. Apparently convinced legislative policy so compels, Texas courts hold compliance by employer with the Texas Compensation Act terminates all liability of employer arising out of covered injuries to employees. West Texas Utilities v. Renner, 32 S.W. 264 (Ct. Civ. Apps. 1930), 53 S.W. 2d 451 (Comm. Apps. 1932); Westfall v. Lorenzo Gin Company, 287 S.W. 2d 551 (Ct. Civ. Apps. 1956, no writ history); McCormick v. United States, 134 Fed. Supp. 243 (S.D. Tex. 1955).

"In short I believe that when the federal law filled a gap in workmen's compensation coverage and allowed indemnity recovery it did not oust state law where validly in force; neither did it limit the force of this valid state law in any manner. States differ as to allowance of indemnity actions but Texas says no."

On the basis of this statement, which I believe is an accurate statement of the law of Texas and which we, sitting as a Texas court, ought, I think, to follow; and of our recent decision in *Kent v. Shell Oil Co.*, 286 F. 2d 746 (1961), I respectfully dissent.

JUDGMENT

Extract from the Minutes of March 30, 1962

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V.
ROYAL NETHERLANDS STEAMSHIP COMPANY

No. 19181 versus

STRACHAN SHIPPING CO.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered and adjudged that the appellee, Strachan Shipping Co., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Dissenting."

March 30, 1962

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit.

No. 19181

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V.,
ROYAL NETHERLANDS STEAMSHIP COMPANY,
Appellant,

versus

STRACHAN SHIPPING CO.,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(June 20, 1962)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and GEWIN, Circuit Judges.

RIVES, Circuit Judge: The appellee Strachan Shipping Co. insists that our decision is irreconcilably in conflict with *Kent v. Shell Oil Co.*, 5 Cir., 1961, 286 F. 2d 746, thus:

> "In Kent a recovery based on a 'federal judicially-established maritime contractual warranty' was prevented by a state compensation act, while the majority in this case holds that a recovery based on a 'federal judicially-established maritime contractual warranty' cannot be prevented by a state compensation act."

It should be pointed out first, that if there is a conflict, it is not a direct one. The present issue of a third party indemnity against the employer of the injured party was not, and indeed could not have been reached in *Kent* since the injured party was not allowed to proceed to judgment against the third party. Further, the primary ground for decision in *Kent* was that no maritime issue was presented since the injury was land based and nonmaritime in character. As an added ground for decision, the Court held that even if an unseaworthiness claim were established, it also could be cut off by the Louisiana Compensation Act. Thus the appellee has a considerable burden in attempting to construct an irreconcilable conflict.

In stating the conflict quoted above the appellee appears to be arguing two separate theories: 1) that the right of the injured party to sue on an unseaworthiness claim is based upon a "federal judicially-established maritime contractual warranty" which *Kent* held could be cut off by state law—ergo, why cannot the warranty sued on by Royal be controlled by Texas; and 2) since Texas may control all the rights and liabilities to the contract of employment between the injured party and his employer, it is inconsistent to deny it control over the liability of the employer to a third party growing out of the employee's claim.

In arguing that unseaworthiness is based upon a contractual warranty, the appellee misconstrues the law to a certain extent to aid the creation of its irreconcilable conflict. In *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, the Supreme Court dealt with this issue in refuting the allegation that unseaworthiness requires a contractual relationship between the injured party and the shipowner. The Court held that the doctrine was not limited to the narrow confines of contract but was an incident to "performing the ship's service with the owner's consent," 328 U.S. at 92-97, which could not be delegated or contracted away, *id.* at 100.

Under either of the appellee's theories, however, the problem is essentially the same: whether the acknowledged efficacy of the Texas compensation act to control the rights and liabilities between the injured party and his employer extends to control over the independent rights of the vessel owner on the stevedoring contract. While the appellee argues that *Kent* decided this issue, the very language relied upon shows that the Court there went no further than the question of the employee's rights.[1] The issue of the vessel owner's rights is of first impression here and stands or falls on analysis of the rights asserted.

The heart of the appellee's argument is that Royal's indemnity is derivative from and based upon the injured employee's rights, and since *West Texas Utilities Co. v. Renner*, 53 S.W. 2d 451 (Tex.), holds that the Texas Compensation Act bars an action attempting to compel the em-

[1] "Unlike many other compensation acts, the Louisiana statute regulates more than the rights as between the injured employee and his employer. Under some circumstances it controls the right of such injured worker against a third party not his employer." Kent v. Shell Oil Company, 5 Cir., 1961, 286 F.2d 746, 750.

ployer to pay "indirectly when no liability existed to pay directly," no indemnity will lie. The word "indirectly," however, relates to the nature of the third party's cause of action, and not to the mere fact that the amount recovered by the injured party may eventually be paid by his employer. The distinction is made clear by the dissent in *Ryan Co. v. Pan Atlantic Co.*, 1956, 350 U.S. 124, 135, upon which the appellee relies in its brief on motion for rehearing. There Justice Black argues not that a contract warranty is an "indirect" recovery against the employer or a recovery "on account of" the injury to the longshoreman, but that no such contract warranty should be implied.[2] The Justice concedes that having found the contract action, a new and independent action exists not barred by the federal compensation act. 350 U.S. at 141. This same analysis has been applied by other courts in allowing an indemnity in spite of similar language in their state compensation acts. Thus in *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, N.Y., 1938, 15 N.E. 2d 567, the New York court held that "an independent duty or obligation owed by the employer to the third party is a sufficient basis for the action," 15 N.E. 2d 569. Similar such independent duties were found in *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, Mo. 1959, 323

[2] "As between wrongdoers the courts will under some circumstances impose the total liability on the 'primary' or 'active' wrongdoer, apparently meaning the wrongdoer the court deems to be the most negligent. But indemnity so imposed is plainly 'on account of' the negligence of the wrongdoer or his employees. The Act expressly forbids such a recovery by 'anyone' from a stevedoring company 'on account' of an injury to one of its longshoremen. Plainly, common-law indemnity should not be used to fasten such a liability on a stevedoring company. I suppose it is for this reason that the Court purports to find an actual contract to indemnify. . . . ." 350 U.S. at 142.

S.W. 2d 788; *American President Lines v. Marine Terminals Corp.*, 9 Cir. 1956, 234 F. 2d 753; *General Electric Co. v. Moretz*, 4 Cir. 1959, 270 F. 2d 780. Where a state court disagreed with the argument that there was an independent duty or a contract warranty permitting the indemnity, it did not call the duty "indirect" but held that under the applicable law it did not exist. See *Hunsucker v. High Point Bending & Chair Co.*, N.C. 1953, 75 S.E. 2d 768, 774.

Thus the appellee's only logical argument from the basis of the Texas cases is that if the issue of an implied contractual warranty for workmanlike performance came before the Texas courts, they would hold that it did not exist. It is at this point, however, that maritime law controls. *Ryan, supra*, conclusively decided that a stevedoring company gives an implied contractual warranty to perform services in a workmanlike fashion; it is, therefore, no longer open to the Texas courts to determine otherwise no matter what they might decide with respect to contracts controlled by state law. Having found such a warranty, it is no longer open to the appellee to argue that indemnity is "indirect" in terms of the *Renner* case. Nor do we see under any circumstances how Texas could cut off Royal's contractual rights in the absence of federal statutory authority to that effect once a judicially-established maritime rule prevails.

The appellee also argues that we misinterpreted the case of *Westfall v. Lorenzo Gin Co.*, Tex. Civ. App. 1956, 287 S.W. 2d 551. The appellee points out that Art. 8306, Sec. 5, Vernon's Ann. Civ. Stat. (in accord with provisions of the Texas Constitution) specifically provides for recovery against the employer in the case where the employer's gross negligence caused the death of one of his employees, and that the *Westfall* court was undoubtedly referring to this exception when it used the language relied upon in our

main opinion. However, since the injured party in *Westfall* was alive, and the court did not mention Art. 8306, Section 5, we see no reason why we should make such an assumption. While *Jones v. Jeffries*, Tex. Civ. App. 1952, 244 S.W. 2d 924, holds that a living injured employee cannot recover from his employer for gross negligence, we do not feel that it is dispositive of the rights of a third party asking for an indemnity on the same grounds. Even assuming we are in error, however, our decision on the issue in this case would be unaffected.

The petition for rehearing is

DENIED.

CAMERON, Circuit Judge, Dissenting.

ORDER DENYING REHEARING
Extract from the Minutes of June 20, 1962

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V.,
ROYAL NETHERLANDS STEAMSHIP COMPANY

No. 19181 versus

STRACHAN SHIPPING CO.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Cameron, Circuit Judge, Dissents."

* * * *

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
Southern District of Texas
Houston Division

B. A. RAWLINSON, Plaintiff,

vs.

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V., & ROYAL NETHERLANDS STEAMSHIP COMPANY,
Defendant-Third Party Plaintiff,

vs.

STRACHAN SHIPPING CO.,
Third Party Defendant.

CIVIL ACTION NO. 11,954

Mandell & Wright (Arthur J. Mandell), of Houston, Texas; for plaintiff.

Eastham, Watson, Dale & Forney (J. P. Forney), of Houston, Texas; for defendant-third party plaintiff.

Royston, Rayzor & Cook (E. D. Vickery), of Houston, Texas; for third party defendant.

JUNE 26, 1961

In this action by an injured Texas longshoreman against a vessel owner the vessel owner has settled the claim of

the longshoreman; vessel owner now seeks indemnity from longshoreman's employer, a stevedoring company. The stevedoring company has moved for summary judgment on the ground that it has discharged all liability arising out of the accident by full compliance with the Texas Workmen's Compensation laws and the receipt of agreed benefits thereunder by the longshoreman. The case presents rather novel legal problems which have proved difficult of resolution

Plaintiff Rawlinson is an employee of Strachan Shipping Company ("Strachan"), a stevedoring company. Strachan is the third-party defendant in this action and movant in the summary judgment phase. Royal Netherlands Steamship Company ("Royal") is the vessel owner, the defendant and third-party plaintiff.

Plaintiff was injured on July 23, 1956, on a dock in Houston, Texas, while assisting in loading Royal's ship with pipe and while in the employ of Strachan. At the time Strachan was in compliance with the Workmen's Compensation Act of Texas (Article 8306, et seq., V.A.C.S.), and its compensation carrier has compensated plaintiff in accordance with a compromise settlement entered into between the insurer and plaintiff. This settlement was approved on November 1, 1957, by the Texas Industrial Accident Board. Then Rawlinson sued Royal in state court; Royal removed to this court and filed a third-party complaint seeking indemnity from Strachan. In November 1959 Royal compromised Rawlinson's claim, leaving for determination the indemnity action. There being no dispute as to material facts Strachan moved for summary judgment under Fed. Rule Civ. Proc. 56.

Positions of the opposing parties are as follows. Royal's claim is based upon the alleged breach by Strachan of its

implied warranty of workmanlike service. The breach is assumed for purposes of this motion if an enforcable warranty actually exists. The warranty is said to arise from Strachan's implied promise to perform its stevedore duties properly. Royal insists its relationship with Strachan amounts to a maritime contract to be construed according to federal admiralty law. It says that under applicable facts and law, Strachan breached this contract to Royal's detriment and is obligated to make Royal whole. Royal argues this is not tort of any description but breach of contract. Recovery in this action is in no manner an indirect award to Rawlinson arising out of any tortious conduct of Strachan. There was no written contract of indemnity between Royal and Strachan.

Strachan contends recovery in this action is barred as a matter of law because it discharged its duty to Rawlinson by compliance with Texas law and its insurer's payment to Rawlinson. It is argued indemnification amounts to indirect payment to Rawlinson where no legal duty exists to pay directly. Irrespective of the implied contract of indemnity cases Strachan insists the applicable state compensation law, as construed by Texas courts, prevents Royal's recovery.[1]

Royal's position depends upon the applicability and scope of the decision of the Supreme Court in Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956). In Ryan the vessel

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[1]Sec. 3, Art. 8306, V.A.C.S.:

"The employes of a subscriber and the parents of minor employees shall have no right of action against their employer for damages for personal injuries, but such employes and their representatives and beneficiaries shall look for compensation solely to the association (workmen's compensation insurance carrier), as the same as hereinafter provided for."

owner recovered over from the stevedore the amount of the longshoreman's judgment against it. There was no express indemnity agreement. The accident occurred aboard ship, bringing the federal workmen's compensation act (Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 901, et seq.) into play; the Court held, inter alia, that compliance with the federal act was no bar to the indemnity action based upon implied contract. In the latest case on the subject from that Court Mr. Justice Stewart said of Ryan and later cases in the same area:

> "In Ryan Co. v. Pan-Atlantic Corp. . . . it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. This warranty of workmanlike service extends to the handling of cargo, as in Ryan, as well as to the use of equipment incidental to cargo handling, as in Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563. The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. Crumady v. The J. H. Fisser, 358 U.S. 423, 429. The factual allegations of the third-party complaint in the present case comprehend the latter situation." Waterman Co. v. Dugan and McNamara, 364 U.S. 421, 423 (1960).

But this statement must be viewed in light of the legal and factual background of the cases referred to when an effort is being made to determine their scope or applicability to the facts at bar.

The Longshoremen's and Harbor Workers' Compensation Act, Section 5 (33 U.S.C.A., Sec. 905), says "The

liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ." In Ryan the Supreme Court said this provision is no bar to indemnity recovery by the vessel owner; nor is an express indemnity contract necessary. The contract is one implied in fact. Assuming applicability of Ryan, I am of the opinion its scope does not reach cases wherein state workmen's compensation laws apply.

In Ryan and progeny the accidents or injuries were aboard ship and the federal compensation act applied. Here the injury was sustained on a dock. A fair reading of Ryan makes it clear that the Court held the federal compensation act *did* not prevent recovery on the implied contract of indemnity; they did not say that no compensation act *might* prevent recovery, and if this were true, as Royal seems to think, one wonders why the Court bothered to say why it *did* not. This, it seems, is as it should be. The federal compensation act is of limited applicability. It applies only to injuries occurring upon navigable waters of the United States (including any drydock) and then only if workmen's compensation recovery may not validly be provided by state law. So if state laws are to provide for compensation to the injured employee, as here, it seems to me that they must also provide the employer with his side of the bargain. I do not believe the Supreme Court held in Ryan and related cases that Congress, in passing the federal compensation act to fill a gap in compensation coverage, intended at the same time to limit valid state compensation coverage in any manner. As I understand Ryan, there is an implied contract to stevedore properly, the breach of which is actionable if, and

only if, the applicable compensation act does not prevent it. True, the Court's thinking as to *why* the federal act does not bar recovery could be applied as well to the Texas act with the same result, but Texas courts have not chosen to follow this thinking. Apparently convinced legislative policy so compels, Texas courts hold compliance by employer with the Texas Compensation Act terminates all liability of employer arising out of covered injuries to employees. West Texas Utilities v. Renner, 32 S.W. (2d) 264 (Ct. Civ. Apps. 1930), 53 S.W. (2d) 451 (Comm. Apps. 1932); Westfall v. Lorenzo Gin Company, 287 S.W. (2d) 551 (Ct. Civ. Apps. 1956, no writ history); McCormick v. United States, 134 Fed. Supp. 243 (S.D. Tex. 1955).[2]

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[2]The settled law of Texas does not permit indemnity actions against subscribing employers by third parties who were found liable to covered employees. This Texas rule was first announced in West Texas Utilities v. Renner, supra. Renner, employee of Mosher, brought suit against West Texas Utilities for injuries received on the latter's premises. West Texas Utilities impleaded Mosher, seeking to recover the amount of any judgment that might be rendered in favor of Renner against it. In holding the indemnity action would not lie, the Court of Civil Appeals said in 32 S.W. (2) 270:

> "Further, appellee's employer (Mosher) fully protected himself against his own negligence by providing compensation insurance for his employees, **and could not be compelled to pay indirectly when no liability existed to pay directly.** Appellant (West Texas Utilities) had no right of contribution against appellee's employer." (Emphasis supplied).

The latest case is Westfall v. Lorenzo Gin Company, supra. Westfall and Cox, third-party plaintiffs, sought indemnity against Lorenzo Gin Company, third-party defendant employer, in connection with a suit brought against them by Henslee, employee of Lorenzo, on account of injuries sustained in an automobile accident. In holding that Westfall and Cox could not maintain an indemnity

In short I believe that when the federal law filled a gap in workmen's compensation coverage and allowed indemnity recovery it did not oust state law where validly in force; neither did it limit the force of this valid state law in any manner. States differ as to allowance of indemnity actions but Texas says no.

I reach this conclusion cognizant of cases from several courts which seem to disagree. Revel v. American Export Lines, 162 Fed. Supp. 272 (E. D. Va. 1958), is the only case closely in point. There indemnity was allowed the vessel owner from the government and the government from the stevedore for an injury sustained on a pier. The decision was affirmed by the Court of Appeals in American Export Lines, Inc. v. Revel, 266 Fed. (2d) 82 (4th Cir. 1959). Trial court's opinion in that case says stevedore's motion for summary judgment was denied on authority of Ryan, indicating, I believe, that the court thought Ryan prevents *any* state compensation law from protecting the stevedore. However, district court also noted an express indemnity contract between stevedore and United States. Of course, an express indemnity contract might waive protection of state compensation laws. If the court is holding that Virginia law provides no protection by its terms I do not disagree, but if it holds that it could

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action against employer, the Court of Civil Appeals said in 287 S.W. (2d) 554:

> "The gin company (third-party defendant) showed conclusively that it carried workmen's compensation on its employees, that Henslee (plaintiff-employee) was its employee and that its insurance carrier had paid him workmen's compensation. Since the gin company was a subscriber under the Workmen's Compensation Law, appellants (Westfall and Cox) certainly could not obtain judgment over against it for contribution or indemnity. . . ." (citing West Texas Utilities v. Renner).

provide protection I think the case wrong. The appellate court restricted its discussion of the phase of the case which interests us to the statement in 266 Fed. (2d) 87-88 that "it is clear now that Export (vessel owner) may recover from Whitehall (stevedore) as a third-party beneficiary of the latter's contract with the United States." The contract spoken of was an express contract of indemnity.

Two cases from the Court of Appeals for the Second Circuit, Booth Steamship Co. v. Meier & Oelhaf Co., 262 Fed. (2d) 310 (2nd Cir. 1958), and A/S J. Ludwig Mowinckels R. v. Commercial Steve. Co., 256 Fed. (2d) 227, 230 (2nd Cir. 1958), seem to agree with the district court in Revel, but their statements relate more to the general principle of applicable law and, as to our question, are dicta.

These two Second Circuit cases do bear directly on applicability of federal law to these facts. I have assumed its applicability and decided that even though applicable, it does not override Texas law and allow recovery here. The court said in Booth in 262 Fed. 2d 312:

> "In the two recent cases in which the Supreme Court announced and discussed the implied warranty of workmanlike service it evidently assumed the federal character of the law to be applied to maritime service contracts, since it did not in any way advert to state law." (citing Weyerhauser and Ryan).

The Mowinckels case seems to agree. I think the Supreme Court failed to advert to state law because the injuries were aboard ship where federal compensation law applied and state law was patently inapplicable. The Fourth Circuit has made this clear in Revel. Indemnity was allowed there,

treating vessel owner as third-party beneficiary of stevedore's express contract to indemnify the government, a middleman. The court said in 266 Fed. 2d 84:

> "Since Revel was injured while standing on the dock, (an extension of the land) his remedies are restricted to those afforded by local law (citing many cases). This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States. Extension of Admiralty Act, 46 U.S. C.A. Sec. 740."[3]

Further as to the Extension of Admiralty Act, 46 U.S. C.A. Sec. 740, the district court in Revel (162 Fed. Supp. 283) said, and I agree:

> "To oust state compensation acts from an established and important area of coverage by reason of the passage of the Extension in Admiralty Act, which makes no reference to the field of compensation law, would create a situation in which a longshoreman, such as the plaintiff herein, would not be covered by any workmen's compensation act, state or federal, as the federal act covers only those injuries occurring 'upon the navigable waters', 33 U.S.C.A. Sec. 903(a), and it is established that injuries suffered on piers or docks (as opposed to drydocks) are not included."

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[3]Extension of Admiralty Act, 46 U.S.C.A. Sec. 740:

"The admiralty and maritime jurisdiction of the United States shall extend to the include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water."

See also *Kent v. Shell Oil Company*, 286 F. 2d 746, 750 (5th Cir. 1961). It seems clear that the lower court in Revel rejected the contention of vessel owner that the Extension of Admiralty Act imported substantive maritime law into these dock cases where state compensation laws apply. The district judge was of the opinion that the substantive law is not changed; at least not to the extent that state compensation laws are affected. I agree. As pointed out above though, the lower court in Revel seems to think that in Ryan the Supreme Court held that Congress meant the Harbor Workers' Act or general maritime principles to override these state laws. I do not agree.

I conclude that had Congress meant to cripple state workmen's compensation laws of wide application and long standing they would have said so. I do not believe Congress intended to do so by the back door Under controlling Texas compensation cases Royal is not entitled to indemnity recovery from Strachan. Strachan's amended motion for summary judgment will be granted. The clerk will notify counsel to draft and submit appropriate order.

JOE INGRAHAM
United States District Judge

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18181

BENJAMIN F. KENT and EMPLOYERS CASUALTY CO., Appellants,

versus

SHELL OIL COMPANY and THE TEXAS COMPANY, Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(January 31, 1961)

Before CAMERON, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: This is a variation in a minor key of the recurring theme on the rights of maritime workers or those working, ashore or afloat, around maritime enterprises. At times the problem takes the cast of whether the person injured is a seaman entitling him to sue his employer under the Jones Act or the General Maritime Law for Unseaworthiness rather than recover workmen's compensation under either the State of Federal Acts.[1]

[1] See, e.g., Offshore Co. v. Robinson, 5 Cir., 1959, 266 F. 2d 769, 1959 AMC 2049; Braniff v. Jackson Ave.-Gretna Ferry, Inc., 5 Cir., 1960, 280 F. 2d 523, —AMC—; Thibodeaux v. J. Ray McDermott & Co., Inc., 5 Cir., 1959, 276 F. 2d 42, —AMC—; see Bear, At Sea with the United States Supreme Court, 38 N.C.L. Rev. 307, 371-78 (1960).

In others the question is whether in a claim by an employee against his employer, the recovery is under the State rather than the Federal Compensation Act.[2] In others it is whether a person not employed by a vessel is doing work substantially that generally performed by seamen so as to obtain the protection of seaworthiness traditionally extended to seamen.[3] We deal here with the latter phase. More particularly we are confronted with two subsidiary questions. The first is the sufficiency of the proof of asserted unseaworthiness of the vessel and the equipment supposedly furnished by or adopted by the barge.[4] The second is whether an assumed breach of such warranty extends to injuries sustained on shore by an employee of a third party performing services as an independent contractor for the vessel owner under circumstances in which the Louisiana Compensation Act would insulate such vessel owner from third party liability.

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2 See, e.g., Flowers v. Travelers Insurance Co., 5 Cir., 1958, 258 F. 2d 220, 1958 AMC 2420, cert. denied, 359 U.S. 920, 79 S.Ct. 591, 3 L.Ed. 2d 582; Noah v. Liberty Mutual Ins. Co., 5 Cir., 1959, 267 F. 2d 218, 1959 AMC 573, reversing 265 F. 2d 547; Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F. 2d 794, 1960 AMC 1811, modified on rehearing 279 F. 2d 75, 1960 AMC 1323; T. Smith & Son, Inc. v. Williams, 5 Cir., 1960, 275 F. 2d 397, 1960 AMC 1296; see Baer, supra, note 1 at 341, 351.

3 Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 AMC 698; Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143, 1954 AMC 1; West v. United States, 1959, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed. 2d 161, 1960 AMC 15; United N.Y. & N.J.S.H. Pilots Assn. v. Halecki, 1959, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541, 1959 AMC 558; Roper v. United States, 4 Cir., 1960, 282 F. 2d 413, 1960 AMC 1719, cert. granted, —U.S.—, —S.Ct.—, —L.Ed.— [November 25, 1960, 29 L.W. 3182]; see Baer, supra, note 1 at 366.

4 Alaska Steamship Co. v. Petterson, 1954, 347 U.S. 396 74 S.Ct. 601, 98 L.Ed. 798, 1954 AMC 860; Rogers v. United States Lines, 1954, 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120, 1954 AMC 1088.

As usual the setting and the immediate facts are deceptively simple. Kent sued the Texas Company and Shell Oil Company. Kent was employed by Newsome Truck Line as a truck driver. As an independent contractor, Newsome transported oil field pipe for Shell from a storage yard near Harvey to Venus, Louisiana, a service port for nearby oilfields. Shell generally transported much of the pipe in its own trucks. When Newsome hauled pipe, it was obliged to unload it from the truck onto the ground or occasionally onto a barge.

On this occasion Kent's truck along with two other Newsome trucks and one operated by Shell hauled the four loads of 4" wrapped pipe. This pipe was for use in the fields between wells and tank batteries. On arrival after dark at the Shell yard, the trucks were sent to the Texas Company landing located in a slip off the Mississippi River where the pipe was to be unloaded onto a barge. The unmanned barge was held in against the bulkhead by a tug. Who owned or operated the tug and barge is not shown by the record. It is undisputed, however, that each was to be used for handling this pipe for Shell. There were no lights, save the headlights of one of the trucks, nor any crane or other lift equipment to transfer the pipe from the bed of the truck trailers onto the barge. As a truck was to be unloaded it would be parked parallel to the bulkhead-wharf. Skids—timbers approximately 3" x 8" x 15' long—were run from the barge to the truck. The bottom end of each rested unsecured on the deck of the barge, the other end on the truck tire.[5] The pipe was stacked on the truckbed in a pyramid shape. Pinch bars

[5] Kent described it somewhat differently. According to him two long skids ran from the barge; a shorter skid then ran from the truck tire down onto the long skid.

were used by the truck drivers, one at each end of the truckload, to start a section of pipe moving. The pipe section would drop or roll onto the two skids and then onto the barge. The men, however, stood clear of the pipe ends.

While Kent's truck was being unloaded in this fashion, the skids at the end of the truck opposite him slipped somewhat out of position, apparently from some movement of the barge. His helper restored it to the prior position. At about the same time the skid at Kent's end slipped similarly. To restore its position, he had to place himself between the wharf edge and the side of the truck. That meant also that he was between the load of pipe and the wharf. While in that position some of the pipe started rolling off the truck. What caused it to do so was not shown. There was, however, absolutely no evidence whatsoever that anything done on the barge or in the handling of the skids caused the pipes to move or roll on Kent. In a physical sense, this was due to the manner in which the pipe was loaded or left on the truckbed, was handled by the helper at the other end, or was not properly secured.

The contention now urged is that the Trial Judge erred in not submitting appropriate instructions and special interrogatories under F.R.Civ.P. 49(a) on unseaworthiness. But this was all an afterthought in the very closing minutes of the trial. The pleaded complaint was a simple one by Kent against the Texas Company and Shell. It alleged simple negligence and nothing more.[6] Nowhere in the

[6] The complaint stated: "* * * plaintiff was preparing to unload steel pipe from a truck. Plaintiff was on the ground near the truck. An employee of Shell Oil Company * * * was assisting some other person in removing one of the steel pipes * * * and negligently caused the said pipe to fall upon plaintiff inflicting severe * * * permanent injuries. * * *

pleadings, or in the pretrial proceedings or in counsel's opening statement to the jury was unseaworthiness or anything remotely resembling that concept—so well known to plaintiff's experienced counsel—ever mentioned. Nor was there any evidence on the issue other than the bare description of the layout which we have summarized above. Not until the jury submission was the matter raised. But the refusal to charge on unseaworthiness has now become decisive. For the jury by special interrogatories submitted in connection with general instruction (F.R.Civ.P. 49(b)) held specifically that neither Shell nor Texas Company was negligent; that Kent was 50% contributorily negligent; and that the work of hauling and handling the pipe was a part of the usual trade, business and occupation of Shell.

We think the District Court's action in refusing issues or instructions on seaworthiness was proper in several respects.

Kent was a truck driver. What he was doing was unloading a truck. What he was doing in the unloading of the truck might incidentally have been a part of loading the barge, but the equipment complained of—the timber skids—was as much a part of the equipment of the truck as it was of the barge. He was injured by pipe then on the truck rolling off onto him. Nothing the barge or tug did caused the pipe to roll or move. Indeed, nothing about

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"* * * Defendant, Shell Oil Company * * * was further negligent in causing plaintiff's injuries, in that said dispatcher instructed plaintiff to unload the said pipe at a place where there was no light, or entirely inadequate light, and under hazardous conditions."

There is no longer any serious contention that a case was made out against the Texas Company as a gratuitous lender of the wharf.

the skids or the fact that they may have slipped or needed repositioning caused the pipe to roll.

It might be argued that he would not have been in that position were it not for the skids being used. But the cause of the injury in no sense could be attributed to the vessel or its appurtenances, even if it is assumed that the skids were part of the barge's equipment through judicial adoption, see note 4, *supra*. This means that the "injuries" were non-maritime in nature. The extension of admiralty jurisdiction statute, 46 USCA §740, does not therefore make a classic non-maritime, land-based injury into something else.[7]

That brings into play two principles, one of federal constitutional and statutory recognition of exclusive state power, the other concerning the peculiar manner, in which Louisiana—within that power—has fashioned its policy respecting the rights of victims of industrial injuries. As to the first, shore-based injuries sustained by those working even in direct relation to maritime matters without exception have long been recognized by the Supreme Court as a matter for application of state compensation acts.[8] And this was given express congressional recognition in the Longshoremen's & Harbor Workers' Compensation Act, 33 USCA §§901-950, in the exclusion from coverage

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[7] As the injuries are wholly non-maritime our problem is in no way complicated by the "maritime-but-local" or the "twilight zone" wrinkles.

[8] T. Smith & Sons v. Taylor, 1928, 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520, 1928 AMC 446; State Industrial Commission of New York v. Nordenholt Corp., 1922, 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933; Offshore Co. v. Robinson, 5 Cir., 1959, 266 F. 2d 769, 1959 AMC 2049; see Baer, supra note 1 at 341.

of those claims validly within state compensation statutes.[9] To be sure this involves that phase of the general problem relating to the rights of an employee vis-a-vis his own employer. But this is the prelude for the second principle—the unique Louisiana policy.

Unlikely many other compensation acts, the Louisiana statute regulates *more* than the rights as between the injured employee and his employer. Under some circumstances it controls the right of such injured worker against a third party not his employer. LSA—R.S. 23:1061.[10] And as construed uniformly by the Courts this provides in substance that an employee of an independent contractor injured by the negligence of the third party for whom the independent contractor is performing the service has no right to recover damages if the work being performed was a part of the usual trade, business and occupation of such third party. His sole remedy against either his em-

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[9] Under §903(a) recovery may be had under the Act only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." 33 USCA §903(a).

[10] Louisiana Revised Statutes of 1950, 23:1061

"Principal contractors' liability

"Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business or occupation * * * and contracts with any person (in this section referred to as contractor) for the execution by * * * the contractor of * * * any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work * * * any compensation under this Chapter which he would have been liable to pay, if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer * * *."

ployer or such third party is under the Louisiana Compensation Act[11] which itself carries the usual exclusive liability provision.[12]

This is a part of the Louisiana Compensation Act and reflects that state's policy in dealing with a situation that elsewhere has been productive of many problems in judicial admmistration.[13] Although the context is different since there is was a direct suit by the employee against his employer, *Swanson v. Marra Bros.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045, 1946 AMC 715, seems to make clear that as to such land-based non-maritime injuries it is left to local law to determine rights, duties and remedies. The Court there said of the Longshoremen's Act, "The Act leaves the injured employees in such cases to pursue the remedies afforded by the *local* law, which this Court has often held permits recovery against the employer for injuries inflicted by *land torts* on his employees who are not members of the crew of a vessel. *State Industrial Com-*

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11 Dodge v. Anderson, 5 Cir., 1958, 255 F. 2d 246; Leslie v. Cities Service Refining Corp., 5 Cir., 1958, 252 F. 2d 902; Fontenot v. Stanolind Oil & Gas Co., 5 Cir., 1957, 243 F. 2d 574; Isthmian v. Olivier, 5 Cir., 1953, 202 F. 2d 492; Gant v. Jackson Brewing Co., La. Ct. App., 1959, 112 S. 2d 767; Thibodeaux v. Sun Oil Company, 1950, 218 La. 453, 49 So. 2d 852; Turner v. Oliphant Oil Co., La. Ct. App., 1941, 200 So. 513; Seabury v. Arkansas Natural Gas Corp., 1930, 171 La. 199, 130 So. 1.

12 Louisiana Revised Statutes of 1950, 23:1032:

"Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

"The rights and remedies herein granted to an employee or his dependant on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations.

"Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute."

13 Gilmore & Black, The Law of Admiralty, §6-55 at 363 (1957).

mission v. Nordenholt Corp., 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed 933, 25 ALR 1013 * * * and *T. Smith & Son v. Taylor*, 276 U.S. 179, 72 L.Ed. 520, 48 S.Ct. 228, both *supra*; cf. *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 79 L.Ed. 1631, 55 S.Ct. 884. *Supra*. And it leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board, * * * or on shore. * * *" 328 U.S. at 7, 8.[11] (emphasis added.)

Once this principle of local law is accepted, there is no doubt on this record that the facts compel its exercise. Indeed, the jury verdict was categorical in terms of the Louisiana standard. Shell maintains its own fleet of trucks

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[11] This case dealt with the question expressly reserved in O'Donnell v. Great Lakes Dredge & Dock Co., 1943, 318 U.S. 36, 43, 44, 63 S.Ct. 488, 87 L.Ed. 596. Countering the contention which prevailed in O'Donnell that extended the Jones Act to shore-based injuries to real seamen, it was urged that logic would compel a like extension as to the **Imbrovek, Haverty** and **Uravic** longshoremen vicarious "seamen." To this date the Supreme Court has not yet extended the seaworthiness protection to land-based injuries sustained by longshoremen. **Sieracki** spoke of the "common core of policy" that "for injuries incurred while working **on board** the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner." 328 U.S. at 99. To that was appended footnote 17 reading: "17. In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work, a matter which is relevant, however, in Swanson v. Marra Bros. * * * decided this day. Cf. O'Donnell v. Great Lakes Dredge & Dock Co. * * *." We do not reach this problem specifically and we express no opinion on our ultimate determination whether Strika v. Netherlands Ministry of Traffic, 2 Cir., 1950, 185 F. 2d 555, cert. denied 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343 is correct. See also Pope & Talbot, Inc. v. Corday, 9 Cir., 1958, 258 F. 2d 214; and Valerio v. American President Lines, S.D.N.Y., 1952, 112 F. Supp. 202.

for just such hauling. It supplements the fleet by use of independent contractors including Newsome. The pipe was for direct use in oilfields belonging to Shell. In every sense of the word, what Newsome was to do for Shell was what Shell customarily did for itself. Under Louisiana law, Shell was not liable to Newsome's employee even for its tortious injuries. See note 11, *supra*.

Since Louisiana forbids recovery of damages against such a third party, it matters not whether the asserted third party claim rests on negligence of a kind known to the common law or that of a kind known to the civil law[15] or on notions of unseaworthiness indigenous to the general maritime law.

This conclusion as to the nature of the occurrence and the cause of Kent's injuries affords an additional basis for affirmance independent of this unique Louisiana insulation from liability. Where the injuries are sustained wholly ashore and are caused by a thing not a part of a vessel or its appurtenances, the failure or deficiency of such facility is not deemed either to constitute unseaworthiness or give rise to any recovery under the doctrine of seaworthiness. *Fredericks v. American Export Lines*, 2 Cir., 1955, 227 F. 2d 450, 454, 1956 AMC 57.

Finally, there is the ground specifically stated by the District Judge in declining the requested instructions on unseaworthiness—the lack of evidence of unseaworthiness, or unseaworthiness as a cause of injury. Unseaworthiness to be sure sets in train awesome obligations which distinguish it from negligence. *Michalic v. Cleveland Tankers*, 1960, —U.S.—, —S.Ct.—, 4 L.Ed. 2d 20; *Cox v. Esso Shipping Co.*, 5 Cir., 1957, 247 F. 2d 629, 1957 AMC 1927.

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[15] LSA—Civil Code Art. 2315.

But neither under negligence principles nor the unseaworthiness doctrine does mere injury give rise to a claim. There must be evidence that within the classic definition of seaworthiness the gear being used is not reasonably fit for its intended use. The only proof here was the brief description of the skids and this physical arrangement. Demonstrating that the last minute request for jury instruction on unseaworthiness may well have been a prescient afterthought in the face of the discouraging prospect that the evidence adduced would soon lead to the adverse jury verdict shortly returned, Kent did not undertake to offer any testimony as to what prudent vessel owners would have done or furnished or the respects in which the appurtenances were considered deficient. Nor was there any evidence offered that any deficiency, even if assumed, was the cause of the injuries. Nothing about the skids or the repositioning of them, or the necessity for repositioning caused the pipe to roll. We are not here dealing with contributory negligence either as a bar or in reduction of damages on a comparative basis. We are looking at causation for without unseaworthiness being a cause, there was nothing for jury submission on this score.

On the record thus presented, all of the issues under controlling principles were submitted to the jury under appropriate instructions. The jury resolved the controverted facts. There it ends.

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT

Eastern District of Louisiana
New Orleans Division

NO. 5136 ADMIRALTY

ALPHONSE LEONARD

vs.

LYKES BROTHERS STEAMSHIP COMPANY, INC.

OPINION

On September 13, 1961, libellant, Alphonse Leonard, a longshoreman employed by respondent, Lykes Brothers Steamship Co., Inc., was engaged in the operation of unloading the vessel "RUTH LYKES", which was owned by respondent. On that date, libellant alleges that while he was on the dock next to a railway car, he was injured when part of the ship's rigging, which had been suspended above the dock, suddenly fell upon him.

The present action was brought against respondent as owner of the vessel upon the grounds of negligence and unseaworthiness. To this action respondent filed a motion to dismiss, claiming that libellant, a land worker, possesses an exclusive remedy against respondent under the Louisiana Workmen's Compensation Law.

There is no doubt that so far as compensation is concerned, libellant, having sustained his injury on shore, must pursue the remedy provided by state law. *Swanson v.*

Harra Bros., 328 U.S. 1 (1946); *State Industrial Commission v. Nordenholdt*, 259 U.S. 263 (1922). Since libellant was not injured "on navigable waters", the very terms of the Federal compensation act preclude recovery thereunder. 33 U.S.C.A., Section 933.

Counsel for respondent strongly urges that libellant's remedy is for compensation under the state act, and that by the express provisions of the act, libellant's right to compensation is "exclusive of all other rights and remedies of such employee" against respondent. La. R.S. 32:1032. This, simply stated, is the basis for his motion to dismiss.

Thus, this Court is again faced with the now familiar conflict between the applicability of state versus federal law in the field of admiralty or maritime law.

Libellant alleges that he was injured as a result of an unseaworthy condition existing on the vessel which he was at the time of his injury engaged in unloading. Since the decision of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), it has become settled that the warranty of unseaworthiness extends to persons engaged in stevedoring activities. Although in *Sieracki* the injury involved occurred on a vessel afloat on navigable waters, the principle therein recognized applies equally to injuries sustained ashore by longshoremen when such injuries are caused by an unseaworthy condition of a vessel. 46 U.S.C.A., Section 740; *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (3rd Cir., 1936); *Revel v. American Export Lines, Inc.*, 162 F. Supp. 279 (Va., 1958), aff'd. 266 F. 2d 82 (4th Cir., 1959); *Litwinowicz v. Weyerhauser Steamship Co.*, 179 F. Supp. 812.

Libellant was engaged in maritime activities, *Atlantic Transport Co. v. Imbrovak*, 234 U.S. 52, and although he

was injured on shore, his injuries were maritime, having been caused by a floating vessel. 46 U.S.C.A., Section 740. He is therefore entitled to a maritime remedy. In order to hold otherwise, it would be necessary for this Court to ignore the express and well-founded restrictions placed on local law in cases in which it conflicts with the federal maritime law. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

In *Royal Netherlands Steamship Co. v. Strachan Shipping Co.* —F. 2d— (5th Cir., 1962) No. 19181, decided March 30, 1962, a longshoreman, employed by Strachan, sued for injuries sustained on a dock while he was engaged in loading a ship owned by Royal Netherlands. The longshoreman sued Royal Netherlands, which, in turn, filed a third-party complaint against Strachan for indemnity. Strachan then evoked the "exclusive remedy" protection of the state compensation law, and on that ground moved to dismiss the third party complaint. The district court granted the motion to dismiss. The Fifth Circuit Court of Appeals reversed, stating:

> "Federal statutes, if constitutional are paramount to any judicially fashioned rules of admiralty; state laws are not. . . . Thus while a Congressional direction denying recovery would be decisive, a state rule would not. * * *
>
> Since we find no federal constitutional, statutory or other rule contrary to the federal rule fashioned in *Ryan*, supra, we conclude that Royal's contractual rights against Strachan are not affected by the state rules governing the injured party's compensation rights and remedies."

Adopting the *ratio decidendi* of the above-quoted authority, this Court holds that whatever effect the Louisiana compensation law might have in regulating the relationship of respondent and libellant as employer and employee, it may not validly preclude the pursuit of a remedy under the federal maritime law.

In accordance with the foregoing reasons, the exceptions to the libel and motion to dismiss, filed by respondent, Lykes Brothers Steamship Co., Inc., are DENIED.

New Orleans, Louisiana, June 29, 1962.

/S/ HERBERT W. CHRISTENBERRY
United States District Judge